FILED
FEB 6 2002
OFFICE OF THE CLERK

No. 01-1826

IN THE

Supreme Court of the United States

STATE OF NEVADA; HUGH RICCI, P.E., in his capacity as Nevada State Engineer,
Petitioners,

and

TOWN OF FERNLEY,
Real Party in Interest,

v.

UNITED STATES OF AMERICA; AND PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Ninth Circuit's rejection of basic Nevada water law principles impermissibly infringe on Nevada's sovereign right to administer its water resources through statutory schemes and judicial decisions that should be respected by federal courts?

2. Does the Ninth Circuit's misapplication of the investment-backed expectations doctrine and its implicit mischaracterization of Nevada's statutory water law as "background principles of state law," impermissibly nullify NRS 533.085 and reverse Nevada Supreme Court precedent that conclusively determined pre-statutory water rights are immune from statutory restrictions?

3. By allowing a collateral attack on a finally-determined water rights decree, does the Ninth Circuit's ruling undermine the stability of western economic systems whose prosperity rests on the conclusiveness of those decrees?

4. Does the Ninth Circuit's ruling, by characterizing the creation of water rights in the Project in a fashion that is not recognized by Nevada water law, conflict with this Court's longstanding precedent that the creation and use of water rights in a federal reclamation project are governed by state law?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, State of Nevada and Hugh Ricci, P.E., in his capacity as the Nevada State Engineer (collectively "Nevada"), respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit entered on July 5, 2001, review of which is sought by this petition, is reported at 256 F.3d 935 (9th Cir. 2001) and is reproduced in the appendix hereto ("App.") at A-1 to A-26. The Opinion of the District Court for the District of Nevada, entered on May 14, 1999, is reproduced at App. B-1 to B-21. In addition, Nevada State Engineer's Ruling No 4116, from which the District Court administrative appeal was filed, is reproduced at App. C-1 to C-27.

JURISDICTION

The Opinion of the Ninth Circuit was entered on July 5, 2001. On November 8, 2001, the Ninth Circuit denied the State Engineer's petition for rehearing and for *en banc* review. App. D-1 to D-3.

This is an appeal from a decision of the Nevada State Engineer regarding water rights that were adjudicated by the federal district court in the *Orr Ditch* decree. *United States of America v. Orr Water Ditch Co., et al.*, In Equity Docket No. A-3 (D. Nev. 1944) (*Orr Ditch* decree) (App. E-1 to E-19). The district court's jurisdiction over the appeal vested pursuant to its continuing jurisdiction over the *Orr Ditch* decree. *United States of America v. Orr Water Ditch Co.*, 914 F.2d 1302, 1306-10 (9th Cir. 1990), *cert. denied*, 498 U.S. 817 (1990). Jurisdiction of the Ninth Circuit was based upon 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Ninth Circuit decision is the latest in a series of decisions by that court that have incrementally eroded this Court's ruling in *Nevada v. United States*, 463 U.S. 110 (1983). Through litigation that was resolved in *Nevada v. United States*, the United States and the Pyramid Lake Paiute Tribe of Indians (Tribe) failed in their attempt to acquire an additional water right for a tribal fishery through the reallocation of water rights that had been decreed in the *Orr Ditch* decree.[1] The Tribe and the United States had sought to have part of Claim 3 in the *Orr Ditch* decree moved from the Project to Pyramid Lake.[2] This Court rejected that attempt because the *Orr Ditch* decree was a final determination of the United States' right to water and modification of the *Orr Ditch* decree would violate the principles of res judicata. The Court stated:

> We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West. . . .
>
> . . . .
>
> [T]he Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in

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[1] The United States filed an action in 1913 to quiet title to all water rights from the Truckee River in the Newlands Project area. The resulting legal activity became known as the *Orr Ditch* litigation. In 1944 the District Court entered its final decree. *Nevada v. United States*, 463 U.S. at 115-18. With respect to the waters of the Carson River, a similar quiet title action was begun by the United States in 1925. A final *Alpine* decree for the Carson River was entered by the District Court in 1980. *United States of America v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983).

[2] Claim 3 in the *Orr Ditch* decree grants water to the United States for the Project based on efforts the United States initiated in 1902. App. E-4 to E-5.

> irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada v. United States, 463 U.S. at 121-26.

When the United States and the Tribe lost their attempt to reallocate Claim 3 water to Pyramid Lake through the *Nevada v. United States* litigation, they began an effort to challenge every water right in the Project based on the state law principles of forfeiture, abandonment, and lack of perfection. If these challenges are successful, potentially thousands of acre-feet of water that are currently allocated under Nevada law and the *Orr Ditch* decree for the Project will be declared void, and that water will flow to Pyramid Lake. In any event, Nevada water law should govern the Tribe's and the United States' forfeiture, abandonment, and lack of perfection challenges. The Ninth Circuit misinterpreted Nevada water law in a fashion that facilitates the Tribe and the United States' efforts to succeed in voiding thousands of acre-feet of water rights in the Project.

This case stems from decisions made by the Nevada State Engineer on applications filed by the Town of Fernley, Nevada (Fernley), to change the manner and place of use of approximately 280 acre-feet of water that had been decreed under Claim No. 3 of the *Orr Ditch* decree for the Project.[3]

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[3] Fernley desired to change the manner of use of the decreed water rights from the decreed use of irrigation, storage, power, domestic, and other purposes to municipal use and to change the place of use to the

Fernley is a successor in interest to decreed water rights that are part of Claim 3. The United States and the Tribe protested Fernley's application pursuant to Nevada Revised Statute (NRS) 533.365, on a variety of grounds, including their assertions that the underlying water rights have been abandoned or forfeited. App. C-1 to C-5. After conducting a public administrative hearing, the State Engineer issued Ruling 4116, approving Fernley's application. App. C-1 to C-27.

The significance of Ruling 4116 to this petition was the State Engineer's determination that Fernley's water rights were not subject to Nevada's statutory forfeiture provision, NRS 533.060(2),[4] because a savings provision in NRS 533.085[5] protects all water rights from forfeiture that were *initiated* in accordance with Nevada law before March 22, 1913. App. C-7 to C-9. While recognizing a previous Ninth Circuit ruling that held Claim 3 of the *Orr Ditch* decree did not *vest* in 1902, the State Engineer determined

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Fernley Utilities water service area.

[4] NRS 533.060 was amended in 1999, but those amendments do not apply to the applications pending in this litigation. Act of June 8, 1999, ch. 515, § 7(1), 1999 Nev. Stat. 2630, 2634. The former version of NRS 533.060 which applies to this appeal, and all the applications to change Project water rights that are pending before the State Engineer provides, in pertinent part, that if the owner of a water right in Nevada:

> [F]ail[s] to use the water . . . for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights . . . and privileges appurtenant thereto theretofore acquired.

Id. at § 3(2), 1999 Nev. Stat. at 2631.

[5] NRS 533.085 provides that:

> Nothing contained in this chapter shall impair the vested rigl of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Fernley's water right was *initiated* in 1902 by the United States and Fernley had acquired part of that Claim 3 water right. *Id.*

Whether Fernley's water rights are subject to forfeiture or abandonment under Nevada law is critical because forfeiture is much easier to prove than abandonment. Under Nevada law, forfeiture can be based solely on five successive years of nonuse, while the proponent of abandonment must prove the owner of a water right had the intent to abandon the water right. *In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940). If Fernley's water rights are determined to be subject to forfeiture, that holding will support the conclusion that all Project water rights initiated through Claim 3 of the *Orr Ditch* decree are subject to forfeiture. Then the Tribe's burden of proof to invalidate potentially thousands of acre-feet of water rights in the Project will be significantly less difficult.

The United States and the Tribe perfected an appeal from Ruling 4116 to the District Court. The District Court, sitting as the *Orr Ditch* decree court with continuing jurisdiction over *Orr Ditch* decree matters, affirmed the State Engineer's ruling. App. B-1 to B-21. The District Court with the most intimate understanding of the origins of the *Orr Ditch* decree determined that Fernley's water right was initiated prior to March 22, 1913, because the first act of appropriation of that water right was taken in 1902 when the United States made a claim for water for the Project. App. B-6. This fact, according to the District Court, was reflected in the 1902 priority for Claim 3 that was granted in the *Orr Ditch* decree. *Id.* The *Orr Ditch* decree contains a 1902 priority date for Fernley's water right because, based upon the relation back theory under Nevada water law, the *Orr Ditch* Court determined the initial step of appropriation for Fernley's water right occurred in 1902. App. E-4 (*Orr Ditch* decree stating priority date for Claim 3 is 1902); *Nevada v. United States*, 463 U.S. at 117 (stating the *Orr Ditch* decree determined Claim 3's priority date to be 1902). The District Court also ruled that the doctrine of res judicata estopped

the United States and the Tribe from challenging the date when Project water rights were initiated. App. B-12.

In its analysis the District Court drew an ingenious analogy between a water right adjudication and a line of water users. App. B-7. Under this analogy, each water right owner stands in line, and their place in line is reflected by their seniority, called a priority date, and that place in line is protected by a decree. The District Court commented that under Nevada water law, NRS 533.085, only the persons in line after March 22, 1913, would have water rights that are subject to forfeiture. App. B-9, B-10. Through Claim 3 of the *Orr Ditch* decree, the United States obtained a place in line as of 1902 for the Project. Project water right owners who acquired their rights from the United States stand in the place in line where the United States previously stood. App. B-10. According to the District Court, since Fernley's right was acquired from Claim 3, it stands in line where the United States stood with a water right that was initiated in 1902. *Id.* Therefore, the District Court concluded Fernley's water right could not be subject to forfeiture under Nevada law. App. B-6.

The United States and the Tribe perfected an appeal from the District Court Ruling to the Ninth Circuit. The Ninth Circuit reversed the District Court's decision regarding the application of Nevada's forfeiture statute, relying principally on the following language of *United States of America v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1496 (9th Cir. 1993) (*Alpine III*):

> The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, with the

> purpose of the statute in mind, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.

The Ninth Circuit interpreted this "two sets of rights" holding regarding the vesting date of Project water rights also governs the initiation date of Project water rights. App. A-13. The Ninth Circuit held that Fernley's water right was not initiated on the date the United States took the first steps to appropriate Claim 3 water for the Project but when Fernley's Claim 3 water right was acquired by its predecessor in interest from the United States. App. A-14. According to dissenting Circuit Judge Noonan, the Ninth Circuit's ruling "silently but effectively departs from what the Supreme Court of the United States has already determined [in *Nevada*]," and "misinterprets *Alpine III*, Nevada law, and what is at least implicit in *Nevada v. United States*." App. A-24.

REASONS FOR GRANTING THE PETITION

Since Nevada's enactment of a statutory water appropriation system in the early 1900s, Nevada's legislature made clear that water rights that vested or were initiated before enactment of the statutory system were exempt from any statutorily-adopted restrictions. NRS 533.085(1). Pre-statutory rights are the oldest and most important water rights in Nevada. The Nevada Supreme Court has steadfastly protected pre-statutory rights from restrictions in the statutory system to avoid constitutional takings concerns. *In re Manse Springs*, 108 P.2d at 315-16. The Ninth Circuit has now renounced the long-adhered to efforts of Nevada's Legislature and Supreme Court by announcing a rule that makes all pre-statutory water rights in Nevada subject to Nevada's statutory appropriation system.

Allowed to stand, the Ninth Circuit ruling turns Nevada's water law on its head. Nevada has the sovereign right to regulate the administration of water rights on all

lands in Nevada without interference from the federal government. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). Nevada made the rules that apply to water administration and a federal court should not strip Nevada of that sovereign right by fundamentally altering those rules. This Court should grant certiorari to protect Nevada's sovereign control over its water resources.

The Ninth Circuit has also allowed a collateral attack on a water right decree that this Court expressly ruled was immune from such attacks. *Nevada v. United States*, 463 U.S. at 145. A ruling that was necessarily determined in the decree, the date of initiation of a water right, has been changed by the Ninth Circuit. All the policies supporting res judicata are essential to the water appropriation system in the West because once water rights are finally determined, collateral attack undermines the stability of economic systems whose prosperity rests on the certainty of those water rights. This Court should grant certiorari to correct this serious misstep that opens the door to collateral attacks on long-settled water right decrees and economic systems in the West.

Finally, this Court should grant certiorari because the Ninth Circuit ruling applies special rules to a federal reclamation project that are expressly excluded by this Court's precedent. Allowing new water law rules to be forged in a reclamation project, separate from those announced by state legislatures, is a far-reaching departure from settled law and undermines the stability of water rights in reclamation projects across the West.

I. THE NINTH CIRCUIT'S REJECTION OF BASIC NEVADA WATER LAW PRINCIPLES IMPERMISSIBLY INFRINGES ON NEVADA'S SOVEREIGN RIGHT TO ADMINISTER ITS WATER RESOURCES THROUGH STATUTORY SCHEMES AND JUDICIAL DECISIONS THAT SHOULD BE RESPECTED BY FEDERAL COURTS.

The Ninth Circuit interpreted NRS 533.085(1), which excludes water rights "initiated" prior to 1913 from

Nevada's forfeiture statute, to be inapplicable to rights acquired in the Project from the United States. This holding was made even though the United States had initiated those rights in 1902. In so doing, the Ninth Circuit blatantly nullified Nevada law, and its decision is clearly erroneous. This Court should therefore grant certiorari to review this misinterpretation of Nevada law. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (This Court should grant certiorari solely to review what is asserted to be a misinterpretation of state law by a Court of Appeal "where the alternative is allowing blatant federal-court nullification of state law."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (This Court has "the authority to differ with the lower federal courts as to the meaning of a state statute.").[6] In addition, no deference need be afforded the Ninth Circuit's interpretation of NRS 533.085(1), and the concept of deference to a court of appeal's interpretation of state law in no way bars or advises against granting certiorari. *Leavitt*, 518 U.S. at 137.

The Ninth Circuit held that NRS 533.085(1) could not be applied to anyone who acquired rights in the Project from the United States after 1913 since it did "not make sense to read the term 'initiated' to refer to 1902, the date the United States initiated the water rights for the entire Newlands Project." App. A-12, A-13. In so holding, the Ninth Circuit nullified state law and stripped numerous property rights in Nevada of a significant statutory protection.

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[6] In fact, it has long been the case that the Court will review decisions of the Courts of Appeal where:

> [T]here is "plain" error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); the view of the lower court is "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); or the construction [of state law] is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-487 (1949).

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 n.9 (1985).

A. THE NEVADA LEGISLATURE'S USE OF THE TERM *INITIATED* IN NRS 533.085 REFERRED TO THE DATE THE FIRST STEP WAS TAKEN TOWARD APPROPRIATION WHICH IS IMPLICITLY REFLECTED IN A WATER RIGHT'S PRIORITY DATE.

In 1913 the Nevada Legislature enacted sweeping changes to its water law scheme by enacting a statutory appropriation system. A statutory forfeiture provision was included in the changes and provided that a surface water right would be deemed forfeited if it was not used for five successive years. The Nevada Legislature was sensitive to constitutional challenges to the new statutory water law and therefore included NRS 533.085(1) in that law to limit retroactive application of the statutory water law, including the forfeiture provision. *In re Manse Spring*, 108 P.2d 311, 315-16 (Nev. 1940). As a consequence, any surface water right that was "initiated" prior to March 22, 1913, the effective date of former NRS 533.060, is not subject to those statutes or to forfeiture.

The Ninth Circuit misinterpreted the intent of the Nevada Legislature when the legislature used the word *initiated* because the Ninth Circuit failed to attribute a meaning to the term *initiate* that is synonymous with when the first step is taken to appropriate a water right.

The word *initiate* is a term of art in western water law that is used in the application of the well-established doctrine of relation. Nevada has long recognized that a water right commences not from the date that the water right is perfected but relates back to the *first steps* taken to initiate the right. Thus the date of the first steps taken to appropriate, if the actual appropriation is pursued with reasonable diligence, becomes a water right's priority date. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-44 (1869); *Irwin v. Strait*, 4 P. 1215, 1215 (Nev. 1884).

In describing this doctrine of relation, a leading scholar in western water law confirmed that under the doctrine, "priority relates back to the time at which

acquisition of the right was *initiated*." WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, Vol. I, 383 (1971) (emphasis added). App. F-1. Further, Mr. Hutchins clarified that "the date to which the completed right related back was variously referred to as *initiation* of the claim, commencement of the appropriation, or first step in appropriating water." *Id.* at F-3 (emphasis added).

In his specific review of Nevada water law for the United States Department of Agriculture and the Nevada State Engineer in 1955, Mr. Hutchins wrote:

> Prior to the enactment of any statute prescribing a method of *initiating* an appropriative right, the *first step* in appropriating water ordinarily would be the beginning of the dam or ditch or flume, as the case may be, by means of which appropriation would be effected, and that would be the date of *initiating* the appropriation for the purpose of the doctrine of relation.

WELLS A. HUTCHINS, THE NEVADA LAW OF WATER RIGHTS 16 (1955) (emphasis added). App. G-1.

Given these authorities, it is clear that the meaning the Nevada Legislature intended when it used the term "initiated" was synonymous with when the first steps were taken to appropriate a water right. The statute was intended to protect anyone who had begun the process of acquiring a water right under the pre-statutory scheme but had not yet perfected that water right on March 22, 1913. *See Town of Eureka v. State Engineer*, 826 P.2d 948 (Nev. 1992) (forfeiture statutes should be construed narrowly because "the law disfavors a forfeiture"). *See also Honeywell v. United States*, 661 F.2d 182, 186 (9th Cir. 1981) (as a general rule, grandfather clauses should be narrowly construed). It is also clear the protection from forfeiture carried on with the transfer of the water right to subsequent holders. *In re Manse Spring*, 60 Nev. at 314, 316.

Since the determination of a priority right is dependent on the first steps taken toward beneficial use and the diligent application of effort toward actual use of water, a priority date, by definition, reflects the date of initiation. Under Nevada water law, when a court has determined that a water right has a priority date prior to March 22, 1913, that water right must have been initiated prior to March 22, 1913, for the purposes of NRS 533.085, and is not subject to forfeiture. This interpretation of Nevada water law was confirmed by the *Orr Ditch* Court when it held that "the word 'priority' means the time when the water right was initiated." App. E-11 to E-12.

When the Ninth Circuit distinguished between the priority date for Claim 3 and the date of initiation of all of the Project water rights under contracts that were conveyed from Claim 3 by the United States, this Court fundamentally misconstrued the meaning of NRS 533.085.[7] This reasoning indicates any water right in Nevada that was initiated before 1913, but was conveyed after 1913, would not enjoy the benefit of a pre-1913 initiation date.

B. THE NINTH CIRCUIT INCORRECTLY INTERPRETED NRS 533.085 IN A FASHION THAT CONFLICTS WITH NEVADA SUPREME COURT PRECEDENT.

Certainly no presumption of validity should be given the Ninth Circuit's decision here since its interpretation of NRS 533.085(1) is inconsistent with the interpretation by two Judges of the United States District Court for the District of Nevada as well as the Nevada State Engineer. App. B-19 (*Orr Ditch* decree District Court rejecting "two sets of rights concept"); *United States v. Alpine Land & Reservoir*, 27 F. Supp. 2d 1230, 1241 (D. Nev. 1998)

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[7] *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (A federal court may adopt such a narrowing construction of a state statute if the statute is "'readily susceptible' to the limitation," but a federal court may not "*rewrite* a state law to conform it to constitutional requirements.").

(*Alpine* decree District Court expressing disagreement with "two sets of rights concept"); App. C-7 to C-9 (State Engineer rejecting two sets of rights concept). The greater expertise in interpreting Nevada law must certainly be deemed to lie with those judges and agencies within Nevada who deal regularly with Nevada's water law rather than with the Court of Appeals panel consisting of judges from California and Arizona. *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (Panel of Circuit Judges from Oklahoma, Colorado and Kansas has no greater expertise in interpreting Utah law than District Court or the Supreme Court).

Given the long history of the doctrine of relation in Nevada, it is clear that the Legislature, which must be presumed to have been aware of the law existing at the time of the passage of NRS 533.085,[8] was specifically referring to the doctrines of relation when referring to the initiation of a water right. The term "initiation" simply has no meaning independent of the doctrine of relation back. As was noted by Judge Noonan in his dissent:

> It makes perfect sense for the Nevada legislation to protect the Nevada individuals for whom the United States acted. It makes no sense to suppose with the majority that initiation of appropriation means one thing for purposes of priority and a very different thing for purposes of protection from forfeiture under § 533.085.

App. A-24.

When the United States conveyed its water rights to Project farmers through the execution of contracts, farmers received what the United States had, a water right that had been initiated in 1902 and was not subject to forfeiture. *See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) ("the prior owners must be understood to have

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[8] *Starlets Int'l v. Christensen*, 801 P.2d 1343, 1344 (Nev. 1990).

transferred their full property rights"). The Nevada Supreme Court in *In re Manse Spring*, 108 P.2d 311 (Nev. 1940), made this perfectly clear. The court specifically held that a water right initiated or vested prior to the enactment of Nevada's forfeiture statute in 1913 is expressly excluded from that statute even after the right has been acquired by someone other than the original appropriator. The Nevada Supreme Court stated:

> We direct our attention at this point to a consideration of the question of whether or not by invoking the provisions of section 8 the rights of respondents to the waters of Manse springs, *which admittedly had vested in the predecessor in interest of the respondents long prior to the enactment of said 1913 statute*, would be affected or impaired. . . . The trial court held that to apply the terms of section 8 would have the effect of impairing rights to the waters of Manse springs which had vested prior to enactment of the 1913 statute, and therefore said section should be excluded; that rights acquired before 1913 could only be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely, intentional abandonment.

Id. at 316 (emphasis added). The issue here, as it was in *Manse Spring*, is not when the individual farmers acquired their rights from the United States, but when the right was first initiated by their predecessor in interest, the United States. There is simply no dispute that the rights at issue were initiated by the farmers' "predecessor in interest . . . long prior to the enactment of said 1913 statute." *Id.* In acquiring rights from the United States the farmers received everything the United States had, including the 1902 initiation and priority dates.

1. The Ninth Circuit Gives Forfeiture Law Retroactive Effect.

The Nevada Supreme Court made clear in *Manse Spring* that Nevada's forfeiture statute was not intended to have retroactive effect. *In re Manse Spring*, 108 P.2d at 315-16. The Ninth Circuit gave the forfeiture statute retroactive effect by applying it to a water right that had been initiated prior to March 22, 1913.

There is no legal basis for the Ninth Circuit's conclusion that it does "not make sense to read the term 'initiated' to refer to 1902, the date the United States initiated the water rights for the entire Newlands project" since "[s]uch a reading would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute." App. A-12, A-13. The Nevada Supreme Court made it clear in *Manse Spring* that a successor in interest will in fact benefit from NRS 533.085 even though he or she acquired those rights after the date of the forfeiture statute. *In re Manse Spring*, 108 P.2d at 315-16. The Ninth Circuit ruling directly conflicts with Nevada Supreme Court precedent.

2. Reliance On Appurtenance Is Misplaced.

The Ninth Circuit also erred in differentiating *Manse Spring* from the facts of this case on the basis that the water rights at issue in *Manse Spring* had remained appurtenant to a particular parcel of land. App. A-14, A-15. There is no language in *Manse Spring* that gives any indication that the appurtenance of the water to a given piece of land had any bearing in the decision regarding the initiation date for the purpose of NRS 533.085.

In *Manse Spring*, had an intervening owner of the rights sought and received permission from the State Engineer to transfer those rights, the initiation date of those rights would still have related back to the first acts to divert the water. The holding of *Manse Spring* would have been no different even if a transfer had made the water appurtenant

to a different parcel of land. Appurtenance is not a legitimate basis on which to differentiate *Manse Spring* from the case at hand.

Nevada urges this Court to grant certiorari in order to correct the nullification of Nevada law. By applying a provision of Nevada's statutory appropriation system to a pre-1913 water right, the Ninth Circuit has undermined Nevada's sovereign right to define the rules that govern water appropriation in her borders. Federal courts should respect that sovereignty.

II. THE NINTH CIRCUIT'S MISAPPLICATION OF THE INVESTMENT-BACKED EXPECTATIONS DOCTRINE AND ITS IMPLICIT MISCHARACTERIZATION OF NEVADA'S STATUTORY WATER LAW AS "BACKGROUND PRINCIPLES OF STATE LAW," IMPERMISSIBLY NULLIFIES NRS 533.085 AND REVERSES NEVADA SUPREME COURT PRECEDENT THAT CONCLUSIVELY DETERMINED PRE-STATUTORY WATER RIGHTS ARE IMMUNE FROM STATUTORY RESTRICTIONS.

In interpreting the *initiated* language in NRS 533.085, the Ninth Circuit referred to the investment-backed expectations doctrine. Specifically, the Court stated: "In the jargon of modern takings law, if a water-right holder had an investment-backed expectation as of the effective date of the statute, that holder's water right was exempt from forfeiture." App. A-12. The Ninth Circuit then stated "there is no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water right they acquired would be subject to forfeiture." App. A-13. Dissenting Judge Noonan aptly referred to this insertion of the investment-backed expectations doctrine as follows:

> The majority engages in the speculation that the purpose of the Nevada anti-forfeiture statute was to exempt "investment–backed expectations." Nothing in the language of the

> statute evinces this purpose. Where initiation of appropriation is begun there is no investment. There is merely an assertion of title. As the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investment.

App. A-23, A-24.

A. THE NINTH CIRCUIT'S APPLICATIONS OF THE INVESTMENT-BACKED EXPECTATIONS DOCTRINE IS DIRECTLY CONTRARY TO THIS COURT'S RULING IN *PALAZZOLO V. RHODE ISLAND*, 533 U.S. 606 (2001).

The Ninth Circuit ruled in this case that if Project water right owners acquired water rights through contracts with the United States after 1913, their rights are protected from neither statutory forfeiture, nor by logical extension, the other provisions of Nevada's statutory water law. According to the reasoning of the Ninth Circuit, Project water right owners who acquired water rights after 1913 are not entitled to rely on NRS 533.085 to protect their rights from statutory restrictions because anyone who acquired a water right from the United States after 1913 "did so with notice that any water right they acquired would be subject to forfeiture." App. A-13.

This Court struck down identical reasoning in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo*, the Rhode Island Supreme Court announced a rule that, "a purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 613. The Rhode Island rule, according to this Court, was based in part on the theory that subsequent owners cannot claim any injury from lost value because they purchased or took title with notice of a statutory limitation. *Id.* This Court commented that if a post-enactment transfer of title would absolve the State of its obligation to defend any action

restricting land use, a State would be allowed "to put an expiration date on the Takings Clause." *Id.* Accordingly, this Court held that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a constitutional regulation "by mere virtue of the passage of title." *Id. See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) (if a state could not deprive the prior owners without compensation, "the prior owners must be understood to have transferred their full property rights," including the right of compensation, in conveying their property interest).

The *Palazzolo* decision expressly rejects the Ninth Circuit's reasoning in this case. It is clear that the Nevada Legislature did not intend the statutory forfeiture statute to have retroactive effect because retroactive application of the statute would raise constitutional concerns. *In re Manse Spring*, 108 P.2d 311, 315-16 (Nev. 1940). The Ninth Circuit ruled that constitutional concerns are not raised by the application of the forfeiture statute against Project water right holders who acquired their rights from the United States after 1913 because they were on notice of the forfeiture statute when they acquired rights. In effect, the Ninth Circuit ruled that Nevada's statutory appropriation system became part of the *background principles of state law* for farmers who acquired water rights after 1913.

Consistent with *Palazzolo,* however, the constitutional concerns raised by retroactive application of the forfeiture statute were not resolved by a subsequent purchaser's notice of the forfeiture statute, or *by mere virtue of the passage of title*. And the statutory appropriation system did not become part of the background principles of the law in Nevada. *See Palazzolo*, 533 U.S. at 614-15.

Further, the Ninth Circuit's ruling applies equally to all water rights in Nevada that were vested or initiated before 1913. Upon conveyance of those rights after 1913, the rights would become automatically subject to forfeiture and all the other provisions of Nevada's statutory water law. This result places "an expiration date on the Takings

Clause" by allowing pre-1913 rights to be subject to post-1913 statutes "by mere virtue of the passage of title." This result inappropriately allows post-1913 statutes to apply to pre-1913 water rights in Nevada and is completely contrary to this Court's ruling in *Palazzolo* and the Nevada Supreme Court's ruling in *Manse Spring*. This Court must grant Nevada's petition to correct this erroneous restatement of Nevada water law or, at a minimum, direct the Ninth Circuit to review its decision in light of the ruling in *Palazzolo*.

B. MISAPPLICATION OF INVESTMENT-BACKED EXPECTATIONS DOCTRINE.

The Ninth Circuit also misapplied the investment-backed expectations doctrine because it relies on a flawed premise that farmers who executed their contracts should have known they were *not* getting all the attributes of the water rights the United States conveyed, particularly the immunity from statutory forfeiture.

Application of the investment-backed expectations doctrine in this fashion cuts directly against statements by the author of that doctrine, Justice Brennen, that "the thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in a judicial decree." *Nevada v. United States*, 463 U.S. at 145. As argued above, the right the United States had was not subject to forfeiture. The reasonable expectation of farmers was that the water rights they were acquiring from the United States included all of the rights held by the United States, including the initiation date of 1902 and the protection against statutory forfeiture. *See Nollan*, 483 U.S. at 834 n.2 (prior owners must be understood to have transferred their full property rights).

Accordingly, the concept of investment-backed expectations in fact supports the position that the water rights at issue here are not subject to the forfeiture statute since a successor in interest of a water right acquires not only the right to use the water but the priority or initiation

date as well. *In re Manse Spring*, 60 Nev. at 316. As a consequence, farmers must be deemed to have reasonably expected that their rights were initiated prior to 1913 by their predecessors in interest, the United States, a fact recognized in the *Orr Ditch* decree and protected from collateral estoppel based on the holding in *Nevada v. United States*. It is completely unfair to assume that when farmers executed their contracts they were on notice of the Ninth Circuit's "two sets of rights" fallacy that was announced decades later in *Alpine III*.

C. APPLICATION OF INVESTMENT-BACKED EXPECTATIONS TO NEVADA WATER LAW WAS INAPPROPRIATE.

Despite the fact the parties in this appeal never addressed the investment-backed expectations concept in their briefs, the Ninth Circuit applied the doctrine. *See Dolan v. The City of Tigards*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003 (1992). There are no decisions of the Ninth Circuit, the Nevada Supreme Court, or any other western state court that have applied the doctrine of investment-backed expectations to water law. It was inappropriate for the Ninth Circuit to incorporate this doctrine into Nevada water law. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

As stated above, the term initiated in NRS 533.085 had a very specific meaning in Nevada water law and western water law. Since this meaning is clear, the Ninth Circuit should not have diverged from that clear meaning to effectively rewrite the statute through the use of a foreign legal construct. *Id.* Finally, use of this doctrine in water law can have wide-ranging, detrimental implications that undermine essential tenets of western water law. After this ruling, a person who acquires an unperfected water right does not acquire all the legally protected characteristics of the right that sellers hold. For instance, through the application of this doctrine to Nevada water law, a water right in Nevada that was clearly vested or initiated before 1913 can lose its protection from the statutory forfeiture

provision solely through a post-1913 conveyance. Since this result announces a new rule to govern Nevada water rights but is contrary to the intent of the Nevada Legislature, this Court should grant Nevada's petition and review the decision of the Ninth Circuit.

III. BY ALLOWING A COLLATERAL ATTACK ON A FINALLY-DETERMINED WATER RIGHTS DECREE, THE NINTH CIRCUIT'S RULING UNDERMINES THE STABILITY OF WESTERN ECONOMIC SYSTEMS WHOSE PROSPERITY RESTS ON THE CONCLUSIVENESS OF THOSE DECREES.

Despite the many equitable arguments the Tribe has made to protect Pyramid Lake, the principles of this Court's precedents and Nevada water law must govern the water rights in the *Orr Ditch* decree. For this reason, the *Nevada v. United States* Court ruled against the equitable arguments of the Tribe because they were outweighed by the res judicata principles upon which *Orr Ditch* water rights are based. *See Nevada v. United States*, 463 U.S. at 145 (stating that "despite strong claims on the part of the Pyramid Lake Paiutes," the promises of the decree must be upheld). The Ninth Circuit's ruling in this case raises similar problems.

A. THE NINTH CIRCUIT'S RULING VIOLATES THE RES JUDICATA PRINCIPLES ANNOUNCED IN *NEVADA V. UNITED STATES*.

This Court reversed the Ninth Circuit in *Nevada v. United States* for failure to adhere to res judicata principles. The Ninth Circuit has failed again to adhere to res judicata principles by ignoring a long established principle of western water law that the priority date for a water right reflects the water rights initiation date. Once that date has been finally determined in a water rights decree, it should not be subject to collateral attack.

In *Nevada v. United States*, this Court upheld the principle that once a decree is final, it is not subject to collateral attack. One determination that was made in the *Orr Ditch* decree was that Claim 3 has a priority date of

1902. In order to determine the priority date for Claim 3, the *Orr Ditch* Court necessarily had to determine when Claim 3 was initiated because Nevada's doctrine of relation bases the priority date for a water right on the date the right was initiated. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-44 (1869). Therefore, when the *Orr Ditch* Court determined the priority for Claim 3, it necessarily determined the initiation date for Claim 3. This fact is reflected in the language of the *Orr Ditch* decree which states, "'Priority' means the time when the water right was initiated." App. E-11 to E-12. By allowing the United States and the Tribe to attack the initiation date for Claim 3 water rights, the Ninth Circuit violated this Court's proclamation that the *Orr Ditch* decree was immune from such a collateral attack.

Also, the Ninth Circuit violated the principles of res judicata by allowing the United States and the Tribe to allege Project water rights are diverted from a different source than the water rights awarded to the United States through Claim 3. As stated by the District Court:

> [R]es judicata precludes both the Tribe and the United States from arguing that the farmers should be treated as if they appropriated their water directly from the Truckee River, rather than as a transfer from the United States. As to the priority date for Project water rights, the parties could have argued, during the litigation of the United States' Orr Ditch complaint, that the court should adopt the unique legal fiction that the Project farmers had appropriated water directly from the Truckee instead of from the United States. As this legal theory was not raised during the stream adjudication determining the priority date of Project water

> rights, the parties are precluded from raising the argument in this review of transfer applications.

App. B-19.

The District Court was correct. The *Orr Ditch* Court finally decided when Project water rights were initiated. Allowing an attack on that determination violated the principles of res judicata and has destabilized the validity of all the water rights in the Project. By allowing a collateral attack, the Ninth Circuit has threatened the stability of all water right decrees that, heretofore, were not subject to collateral attack. This Court should grant Nevada's Petition for Certiorari to protect the stability of such decrees.

B. THE NINTH CIRCUIT'S "TWO SETS OF RIGHTS" CONCEPT CONFLICTS WITH THE PRINCIPLE ANNOUNCED IN *NEVADA V. UNITED STATES* THAT WATER RIGHTS INITIATED FOR THE PROJECT BY THE UNITED STATES WERE CONVEYED TO PROJECT WATER RIGHT OWNERS.

The Ninth Circuit's invention of the "two sets of rights" concept, when applied to the initiation of Project water rights, creates a result that is completely contrary to the holding in *Nevada v. United States* that only one set of rights exists in the Project and those rights were conveyed by the United States to the farmers. Since there is only one set of rights, there can be only one initiation date—1902.

In *Alpine III*, the Ninth Circuit reviewed the question of which Project water rights vested prior to 1913, thereby making them immune from forfeiture pursuant to NRS 533.085. *Alpine III*, 983 F.2d at 1496. The Ninth Circuit determined that, for the purpose of deciding when Project water rights vested, two sets of rights exist in the Project. In the case at bar, the Ninth Circuit was faced with the question when Project water rights were initiated. The Ninth Circuit erroneously determined the "two sets of rights" concept also applies to the determination of when a right was initiated. App. A-14. In other words, the Ninth

Circuit ruled Project water rights that were acquired from and initiated by the United States were not initiated by the United States in 1902.

Dissenting Judge Noonan referred to this mistake as a misinterpretation of *Alpine III*:

> [*Alpine III*] was about vesting; this court reversed the State Engineers's erroneous determination that water rights had vested in 1902. *Alpine III*, 965 P.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it), the court amended its disposition to remand the question of initiation. *Alpine III, as amended*, 983 F.2d 1487, 1496 (9th Cir. 1993).

App. A-23.

The inappropriateness of applying the "two sets of rights" concept to the initiation date of Project water rights is evidenced by this Court's statement in *Nevada v. United States*, 463 U.S. at 126, that once Project lands were acquired by settlers in the Project, "the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project." The holding indicates that the rights initiated and confirmed to the United States were conveyed to settlers who irrigated Project lands. Accordingly, the only logical conclusion is that the rights owned in the Project were initiated by the United States when it initiated the right that was confirmed to it in the *Orr Ditch* decree. Since the Ninth Circuit's ruling conflicts with the basic principle of *Nevada v. United States* and destabilizes the validity of water rights in the *Orr Ditch* decree, this Court should grant Nevada's Petition for Certiorari.

IV. BY CHARACTERIZING THE CREATION OF WATER RIGHTS IN THE PROJECT IN A FASHION THAT IS NOT RECOGNIZED BY NEVADA WATER LAW, THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S LONGSTANDING PRECEDENT THAT THE CREATION AND USE OF WATER RIGHTS IN A FEDERAL RECLAMATION PROJECT ARE GOVERNED BY STATE LAW.

A critical error made in the Ninth Circuit's decision is the holding that farmers do not own a water right that was initiated by the United States in 1902. The rights acquired by the farmers are not "akin to new rights" but are in fact rights acquired from a predecessor in interest which retain all the legal attributes of a right that was enjoyed by the previous owner. By ruling that Project rights are "akin to new rights," the Ninth Circuit invented a new type of water right that is not recognized under Nevada water law.

A. NEVADA WATER LAW GOVERNS IN RECLAMATION PROJECT.

The Reclamation Act "clearly provided that state water law would control in the appropriation and later distribution of the water" rights in a federal reclamation project. *California v. United States*, 438 U.S. 645, 664 (1978). Under Nevada water law, water rights fall in two categories, pre-statutory and statutory water rights. Pre-statutory rights are those established or initiated through Nevada's system of prior appropriation before Nevada adopted a statutory appropriation system. Statutory rights are those acquired through applications to the State Engineer under Nevada's statutory system. *See* NRS ch. 533.

B. THE "TWO SETS OF RIGHTS" CONCEPT CONFLICTS WITH NEVADA WATER LAW.

Under Nevada water law, every valid water right must fall within one of these two categories. None of the Project water right owners who acquired water rights through contracts with the United States applied for rights under Nevada's statutory system, yet they hold valid water

rights with a 1902 priority. If these had been new appropriations, as described by the Ninth Circuit's "two sets of rights" theory, the new appropriations would have required applications to be made to the State Engineer and approval be granted by him in order for the appropriation to be valid. NRS 533.325. That was never done because, clearly, these acquisitions of water from the United States were not new allocations. Project water right owners trace the origin of their water rights to Claim 3, not a permit or certificate in the State Engineer's office. Hence, the water rights in the Project are clearly pre-statutory rights because they were established through Nevada's system of prior appropriation when they were initiated by the United States, not through Nevada's statutory appropriation system.

The idea that two sets of rights exist in the Project and Project water right owners acquired a water right directly from a new source when they executed contracts with the United States is completely inconsistent with Nevada water law. On this point, both of the District Courts that review decisions regarding water rights in the Project disagree with the "two sets of rights" concept. The *Orr Ditch* Court rejected this legal fiction based on res judicata principles that preclude the United States and the Tribe from asserting that Project water rights "should be treated as if they appropriated their water directly from the Truckee River, rather than as a transfer from the United States." App. B-19. The *Alpine* Court agreed:

> [T]he court would observe that it agrees with the Engineer that there is only one set of rights on the Project. Every water right which derives from the Project was initiated by the actions of the United States beginning in 1902, when it posted notice that it was acquiring the water rights within the Lahontan Valley. . . . As to Project water, therefore, the court believes that under the relation back doctrine, the 1902 priority date

should be controlling on the issue of forfeiture.

United States v. Alpine Land & Reservoir, 27 F. Supp. 2d 1230, 1241 (D. Nev. 1998). There is no provision of Nevada water law that recognizes that a new water right is created when a contract is executed between an entity that owns a water right and another person or entity.

The only plausible explanation of the legal effect of the water right contracts between the United States and Project farmers is the United States conveyed to the farmers the interests it had in Claim 3 water rights. The United States conveyed the interest it acquired through spending millions of dollars in constructing the Project works for Claim 3 and in exchange the farmers received water rights and incurred the debt of construction. Accordingly, the farmers acquired the United States' Claim 3 right that was initiated prior to 1913 and was not subject to forfeiture.

The legal invention of two sets of rights and two separate initiation dates is incorrect because this invention for water rights in a federal reclamation project is completely foreign to Nevada water law. By allowing new federal law to forge rules that conflict with long-established state law in federal reclamation areas, the Ninth Circuit has undermined the stability of water rights in all federal reclamation projects. Accordingly, it directly conflicts with the Supreme Court precedent. *California v. United States*, 438 U.S. 645, 664 (1978).

Further, the Ninth Circuit ruling dictates the absurd conclusion that, under Nevada law, Project water rights are not currently valid because they can trace their origin to neither Claim 3 of the *Orr Ditch* decree, nor to any certificate or permit issued by the State Engineer. The absurdness of this result illustrates the clear error in the Ninth Circuit's ruling and the pressing need for this Court to grant Nevada's Petition for Certiorari.

CONCLUSION

The underlying Ninth Circuit ruling clearly misstates Nevada water law. As a result, despite this Court's protection of the *Orr Ditch* decree from collateral attack, the validity of all water rights in the *Orr Ditch* decree and the Project are now in doubt. Despite explicit rulings by the Nevada Supreme Court that water rights that vested or were initiated before 1913 are not subject to the statutory water code that was adopted in Nevada, the Ninth Circuit's ruling now makes all pre-1913 water rights in Nevada subject to the statutory water code by virtue of a mere transfer of title after 1913.

The Ninth Circuit has adopted reasoning that is rejected by every court and state official that is bound to administer water law in Nevada. Its reasoning has far reaching destabilizing effects on all water rights in the west. Federal courts should not decide, nor redefine, state water law because such action usurps a state's power to control its own water resources and undermines the years of efforts states have expended to develop effective systems for administering water rights. Accordingly, this Court should grant Nevada's Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner-Appellant,

v.

ORR WATER DITCH COMPANY, et al.,
Defendants,

No. 99-16812

D.C. No. CV-N-A-3-LDG

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,
Defendants-Appellees.

Town of Fernley; Appeal of State Engineer Ruling No. 4116

---/

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

ORR WATER DITCH COMPANY, et al.,
Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,
Defendants-Appellees.

Town of Fernley; Appeal of State Engineer Ruling No. 4116

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No. 99-16817

D.C. No. CV-N-A-3-LDG

OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
December 11, 2000—San Francisco, California

Filed July 5, 2001

Before: Mary M. Schroeder, Chief Judge, John T. Noonan and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;
Dissent by Judge Noonan

SUMMARY

Real Estate/Water Rights

The court of appeals reversed a judgment of the district court. The court held that the 1902 withdrawal of land from public entry for the federal Newlands Reclamation Project (Project) in Nevada did not initiate the appropriation of a water right subject to protection under the Nevada anti-forfeiture statute.

Appellee town of Fernley, Nevada, applied to the Nevada State Engineer to change the manner and place of use of 26 separate water use permits in the Project. The federal government operated the Project, but water rights in the project were held by individual landowners pursuant to contracts between the landowners and the Department of the Interior. The reservation of Appellants Pyramid Lake Paiute Tribe of Indians (Tribe) surrounded Pyramid lake. The Tribe opposed the application on the basis that the current flow of the Truckee River into Pyramid Lake would be diminished if the application were granted, thus adversely affecting the Tribe's economy, culture, and heritage. The United States joined the Tribe in opposition to the transfer. The Tribe and the government contended that the water rights at issue no longer existed because the prior holders of those rights failed to exercise them for an extended period of time, and thus the water rights were forfeited under Nevada statutory law, or alternatively, were abandoned under Nevada common law.

The State Engineer rejected the Tribe's forfeiture argument, concluding that the rights at issue were exempt from forfeiture under the anti-forfeiture statute, as the appropriation of the rights was "initiated" in 1902, when the United States initiated the Project. He further found that the rights were not abandoned under the common law as Nevada did not recognize a legal presumption in favor of abandonment upon a showing of prolonged non-use, and absent such a presumption the Tribe had produced no evidence of abandonment.

The Tribe and the government appealed the State Engineer's ruling to federal district court. The district court affirmed the State Engineer's decision. The Tribe and the government appealed.

[1] The Nevada forfeiture statute, which took effect on March 22, 1913, provides that a water right is forfeited if it is shown not to have been exercised for five successive years. However, under an anti-forfeiture provision, forfeiture does not apply to water rights that were vested, or for which appropriations were initiated, before the forfeiture statute took effect. **[2]** In order for a given right to receive the protection of the anti-forfeiture provision, an individual landowner must have taken affirmative steps to appropriate water for his or her own use by the statute's effective date. At the very least, he or she must have contracted with the federal government for delivery of Project water prior to that date. Thus, the State Engineer erred in concluding that all water rights were initiated as of 1902. The district court made the same error in concluding that because each individual Project water right had a "priority date" of July 2, 1902, it was therefore initiated, within the meaning of the anti-forfeiture, on that same date.

[3] Water rights exempted under the anti-forfeiture statute are subject to the common law principle of abandonment, which requires a showing of subjective intent on the part of a water-right holder to give up that right. **[4]** Under Nevada case law, although a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned, such non-use does not raise a rebuttable presumption of intent to abandon. **[5]** Abandonment is determined from all the surrounding circumstances. Where there is evidence of a substantial period of non-use combined with evidence of the construction of structures which are inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. Where, on the other hand, there is only evidence of non-use combined with the finding of a payment of taxes or assessment, there will not be

clear and convincing evidence to establish abandonment.

Judge Noonan dissented, writing that the anti-forfeiture statute exempted the water rights at issue, as the initiation date for all of those rights was 1902, at the time the United States began the Project.

COUNSEL

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OPINION

W. FLETCHER, Circuit Judge:

The town of Fernley, Nevada, has applied to the Nevada State Engineer to change the manner and place of use of rights to roughly 280 acre-feet of water from the federal Newlands Reclamation Project. The Pyramid Lake Paiute Tribe of Indians and the federal government oppose the proposed transfers, contending that the water rights at issue have been forfeited or abandoned under Nevada state law. The district court affirmed the decision of the Nevada State Engineer that none of the water rights had been forfeited or

abandoned. We reverse and remand for further proceedings.

I. Factual Background

The Newlands Reclamation Project ("the Project") diverts the flow of the Truckee and Carson rivers to supply the needs of water users in Nevada. The Project has two divisions, named after the two rivers. At Derby Dam, the Project diverts part of the flow of the Truckee River southward through the Truckee Canal to join the Carson River at Lahontan Reservoir. From Lahontan Reservoir, the augmented Carson flows east, where its water is distributed to users in and around the city of Fallon, in what is known as the "Carson Division" of the Project. The Project also diverts part of the water in the Truckee Canal before it reaches the Lahontan Reservoir. The water from this diversion is distributed to users in and around the town of Fernley, in what is known as the "Truckee Division." Water from the Truckee River that is not diverted through the Truckee Canal into either of the divisions flows north into Pyramid Lake. The federal government operates the Newlands Project, but water rights in the Project are held by individual landowners pursuant to contracts between the landowners and the Department of the Interior. The nature and extent of those water rights are determined, in large part, by Nevada state law.

The town of Fernley seeks to satisfy its growing water needs by acquiring water rights in the Truckee Division of the Project. This water has historically been used for irrigation purposes, but Fernley would use it for municipal and industrial purposes instead. n1 Fernley filed an application with the Nevada State Engineer to change the manner and place of use of 26 separate water use permits it has acquired, totaling roughly 280 acre-feet of Project water. This is a relatively small transfer, but it raises questions common to many other transfers contemplated by Fernley. n2

The Pyramid Lake Paiute Tribe of Indians ("the Tribe") resides on a half-million acre reservation in Nevada that surrounds Pyramid Lake, a body of water the Supreme Court has described as perhaps "the most beautiful desert lake in

North America." *Nevada v. United States*, 463 U.S. 110, 114 (1983). Pyramid Lake once received the entire flow of the Truckee River, but it now receives only what remains after the river has been tapped by the Newlands Project. In years past, Project diversions have adversely affected the size and ecology of the lake, threatening several varieties of fish, one of which (the cui-ui) is an endangered species. If Fernley's transfer application is granted, its water rights will be exercised and the current flow of the Truckee River into Pyramid Lake will be diminished. *See United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1221 (9th Cir. 1989) ("*Alpine II*"). The Tribe opposes Fernley's application because its economy, culture, and heritage are linked to the size of the flow of the Truckee River and to the health of Pyramid Lake.

The Tribe entered a timely opposition to Fernley's proposed transfer, and the United States joined the Tribe in opposition to the transfer. *See* 1990 Settlement Act, P.L. 101-618, 104 Stat. 3289 §§ 202, 209 (assigning Secretary of Interior the duty to protect the Tribe and the resources of Pyramid Lake); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974). The Tribe and the government contend that the water rights that Fernley seeks to transfer no longer exist because the prior holders of those rights failed to exercise them for an extended period of time. In water law parlance, they contend that the water rights have been "forfeited" under Nevada statutory law, or have been "abandoned" under Nevada common law.

The initial decisions on the proposed transfers were made by the Nevada State Engineer pursuant to his authority under Nev. Rev. Stat. §§ 533.345 and 533.370, and *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 885 (D. Nev. 1980) ("*Alpine Decree*"), *aff'd as modified*, 697 F.2d 851, 857-58 (9th Cir. 1983) ("*Alpine I*"), *cert. denied*, 464 U.S. 863 (1983). The State Engineer approved the transfer of all but a few of the water rights at issue. He first entered factual findings that Fernley was the *bona fide* owner of the water rights and

that the town had been paying the operation and maintenance fees for those rights. He then made a number of other legal and factual findings. We describe those that are relevant to this appeal.

First, the Engineer rejected the argument that some of the water rights at issue had been forfeited under Nev. Rev. Stat. § 533.060(2) (1997). n3 The Tribe and the government had agreed that Nevada law protected from forfeiture water rights that had been "vested," or for which appropriations had been "initiated," before the passage of the forfeiture statute on March 22, 1913. *See* Nev. Rev. Stat. § 533.085. But they contended that some of the water rights at issue were subject to forfeiture because the rights had not vested, and appropriations had not been initiated, before March 22, 1913. The Engineer disagreed, concluding that under Nevada's "relation back" doctrine, appropriations of all of the rights at issue were "initiated" within the meaning of Nev. Rev. Stat. § 533.085 in July 1902, when the United States government initiated the Newlands Project. The Engineer therefore ruled that all of the water rights at issue were exempt from forfeiture under Nev. Rev. Stat. § 533.085.

Second, the Engineer rejected arguments that non-forfeited water rights were abandoned under Nevada common law. He ruled that Nevada did not recognize a legal presumption in favor of abandonment upon a showing of prolonged non-use, and that in the absence of such a presumption the Tribe had produced "no evidence" to indicate that abandonment had occurred.

The Tribe and the government appealed the Engineer's rulings to federal district court in Nevada, pursuant to the procedure approved by this court in *Alpine I*. *See* 697 F.2d at 857-58; *see also United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1308 (9th Cir. 1990). The district court affirmed and denied a later motion for reconsideration. The Tribe and the government appeal to this court. We reverse and remand.

II. Legal Background

Water litigation is a weed that flowers in the arid West.

The federal courts first considered water rights issues in the Newlands Project in 1913, in a quiet-title action instituted by the United States. Over thirty years after that suit was initiated, a Nevada district court finally adjudicated water rights in the Truckee Division of the Project. *See United States v. Orr Water Ditch Co.*, In Equity, Docket No. A-3 (D. Nev. Sept. 4, 1944) ("*Orr Ditch Decree*"). Thirty-six years after that, we adjudicated water rights in the Carson Division. *See Alpine Decree*, 503 F. Supp. at 877, *aff'd*, *Alpine I*, 697 F.2d at 851.

Of particular relevance to this case is a series of decisions involving water rights in the Carson Division. Following the *Alpine Decree* and our affirmance of that decree in *Alpine I*, many water right holders in the Carson Division sought to transfer water rights that were appurtenant to other Project land to their own land. As in this case, the Tribe opposed many of the transfer applications on the grounds that the rights had been forfeited or abandoned. When the State Engineer ruled that Nevada's statutory forfeiture provision did not apply to the water rights at issue and that there was no evidence of abandonment, the Tribe appealed. Initially, a district court affirmed the Engineer on the ground that Nevada law did not apply at all, but in *Alpine II* we disagreed. We reversed and remanded to the district court for review of the Engineer's findings on forfeiture and abandonment based on state law. On remand, the district court affirmed the Engineer's findings. Once, again, the Tribe appealed to this court, and, in *United States v. Alpine Land & Reservoir Co.*, 965 F.2d 731 (9th Cir. 1992), *amended by United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) ("*Alpine III*"), we once again reversed.

On the question of forfeiture, we held that the Engineer had erred in determining that, because of the exemption created in Nev. Rev. Stat. § 533.085, Nevada's forfeiture statute did not apply to the water rights in question. The Engineer had written, "The existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized

Lahontan Dam in 1902." *Id.* at 1495. We disagreed, noting that "the individual rights at issue . . . did not vest in 1902 when the United States obtained Project-wide rights." *Id.* at 1496. We concluded that individual water rights were exempted from the Nevada forfeiture statute only if the rights were vested, or the appropriations had been initiated, prior to 1913:

> If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

Id. We therefore remanded for an individualized determination, for each parcel at issue, of "whether and when the right vested, and under which law appropriation was initiated." *Id.*; *see also United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230 (D. Nev. 1998) ("*Alpine IV*") (district court's opinion on remand).

On the question of abandonment, we held that the State Engineer had abused his discretion by failing to conduct an individualized inquiry to determine whether each water right sought to be transferred had been abandoned by the transferor property owner. *Alpine III*, 983 F.2d at 1494. As of the time we write this opinion, the State Engineer has yet to make the findings required under *Alpine III*. Therefore, while our cases involving the Carson Division (in particular, *Alpine III*) set forth the legal rules for adjudicating questions of forfeiture and abandonment of water rights in the Newlands Project, this Truckee Division case presents the first time we have been asked to review the State Engineer's application of these rules.

III. The Law of Forfeiture and Abandonment

Water rights can be lost in Nevada either through forfeiture or abandonment. In most cases, it is easier to establish forfeiture than abandonment because forfeiture requires only a showing of non-use for five successive years. Abandonment, on the other hand, is the "relinquishment of

the right by the owner with the intention to forsake and desert it." *In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940) (citation omitted). Abandonment therefore requires a showing of actual intent to abandon. Non-use can provide "some evidence" of intent, *see In re Franktown Creek*, 364 P.2d 1069, 1072 (Nev. 1961), but it is not by itself sufficient to establish abandonment. In the case now before us, the Tribe and the government argue that some of the water rights in question are subject to forfeiture. Fernley argues that none of the water rights are subject to forfeiture. The parties agree that all of the water rights are subject to abandonment.

A. Forfeiture

[1] Under Nevada law, a water right is forfeited if it is shown not to have been exercised for five successive years. *See* Nev. Rev. Stat. § 533.060. However, Nevada law specifies that the forfeiture statute does not apply to water rights that were vested or for which appropriations were initiated before that statute took effect, on March 22, 1913:

> Nothing contained in this chapter [establishing the statutory rule of forfeiture] shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Nev. Rev. Stat. § 533.085(1). If a water right is exempted from the Nevada forfeiture statute, it may be lost only through abandonment.

We considered the relationship between Nev. Rev. Stat. § 533.060 and § 533.085 in our decision in *Alpine III*. In that case, the State Engineer had determined that the forfeiture statute did not apply to the water rights at issue because "[t]he existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized Lahontan Dam in 1902." 983 F.2d at 1495. The Engineer assigned all Newlands

Project water rights a single vesting date for purposes of Nev. Rev. Stat. § 533.085—the 1902 date on which Congress initiated the Newlands Project. We rejected this approach in *Alpine III* and instead held that a water right had to be vested, or that appropriation of that right had to have been initiated, for the particular parcel of land to which it was appurtenant for that right to be exempt from forfeiture under § 533.085. *See* 983 F.2d at 1495-97.

Given the purpose of § 533.085, this was a sensible construction of the terms "vested" and "initiated" as used in that statute. The passage of the Nevada forfeiture statute in 1913 made water rights more precarious. Prior to its passage, water rights could be lost only through abandonment; now they could also be lost through forfeiture. To the extent that a water right could be lost more easily after the passage of the forfeiture statute, one "stick" in the "bundle of sticks" that had previously comprised that water right had been taken away.

For water-right holders whose rights had vested by 1913, or who had already initiated appropriations of their rights by that date, the new forfeiture statute could work unfairly because these holders had obtained or initiated appropriations of their rights on the understanding that those rights would not be subject to forfeiture. Indeed, with respect to those individuals, the statute could be more than just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property. The Nevada legislature alleviated concerns about unfairness and unconstitutionality by exempting both categories of holders from forfeiture under § 533.060. If a holder either possessed a vested water right on March 13, 1913, or had initiated appropriation of a water right by that date, the right-holder was protected from forfeiture by § 533.085. In the jargon of modern takings law, if a water-right holder had an investment-backed expectation as of the effective date of the statute, that holder's water right was exempt from forfeiture.

Given the purpose of § 533.085, it does not make sense to

read the term "initiated" to refer to 1902, the date the United States initiated the water rights for the entire Newlands Project. Such a reading would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute. There was reason to protect individuals whose investment-backed expectations would be violated by § 533.060, and § 533.085 did so by exempting their rights from forfeiture. But there was no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water rights they acquired would be subject to forfeiture.

As we explained in *Alpine III*,

> According to the Nevada Supreme Court, the Nevada legislature included the provision exempting pre-1913 rights from impairment "to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the Act." *Manse Spring*, 108 P.2d at 315.
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> The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, *with the purpose of the statute in mind*, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.
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> * * *

> If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

Alpine III, 983 F.2d at 1496 (emphasis added).

[2] We held in *Alpine III* that in order for a given water right to receive the protection of Nev. Rev. Stat. § 533.085, that water right must have vested, or an individual landowner must have "initiated" appropriation of that right, before March 22, 1913. In other words, the landowner must have taken affirmative steps to appropriate water for his or her own use by that date. In practice, this means that the individual must have (at the very least) contracted with the federal government prior to that date for delivery of Project water. Accordingly, we hold that the State Engineer erred in concluding that, for purposes of § 533.085, all water rights in the Truckee Division were "initiated" when land for the Newlands Project was withdrawn from public entry by the federal government in 1902. We further hold that the district court made the same error when, in affirming the Engineer, it concluded that because each individual Project water right has a "priority date" of July 2, 1902, it was therefore initiated, within the meaning of § 533.085, on that same date.

We agree with the Engineer and the district court that the priority date for all of the rights at issue in this case is 1902. The Orr Ditch Decree, affirmed by the Supreme Court, established this priority date. *See Nevada v. United States*, 463 U.S. at 117. But our holding in *Alpine III* did not concern a priority date. Rather, it concerned the forfeiture exemption provided by § 533.085.

In *Alpine III*, we remanded the case for a determination of vesting and initiation dates for particular parcels. The district court to which we remanded in *Alpine III* understood our holding in the same way we understand it today, writing that *Alpine III* "drew a distinction between the rights obtained by the United States and the rights appurtenant to particular

tracts of land" for purposes of Nev. Rev. Stat. § 533.085. *Alpine IV*, 27 F. Supp. 2d at 1240. The district court accordingly directed the Engineer to determine "when the individual landowner took the 'first steps' to appropriate the water appurtenant to his land, and not [to] rely on the 1902 priority date." *Id.* at 1241. Failure to do so, the district court observed, would be an abuse of discretion. *See id.*

Our reading of *Alpine III* is reinforced by the history of that decision. After a petition for rehearing, the *Alpine III* panel modified its opinion. The original language of the *Alpine III* remand order appears at 965 F.2d 739:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether when [sic] the right vested. Only if the right vested after March 22, 1913 would it be subject to possible forfeiture under NRS 533.060.

This language caused some concern to the appellees in that case, the State Engineer and the Truckee-Carson Irrigation District ("TCID"). They pointed out that Nev. Rev. Stat. § 533.085 protects not only the "vested right of any person to the use of water" but also "the right of any person to take and use water . . . where appropriations have been *initiated* in accordance with law prior to March 22, 1913." Nev. Rev. Stat. § 533.085 (emphasis added). TCID argued in its brief that "[t]he Court's focus on the vesting date of these water rights ignores the fact that the same protection afforded vested water rights was also extended to *non-vested* water rights in the Nevada Water Law of 1913." It then stated that there was "no question" that the water rights at issue were "initiated" prior to 1913. The State Engineer's brief argued that *Alpine III* had ignored the principle of "relation back" by separating "vesting date" from "priority date," and had erred in distinguishing the water rights acquired by the federal government from the Project farmers' water rights. Once the farmers received their land patents, the Engineer argued, "the Project farmers acquired the Government's interest in the water rights, and once the water was put to beneficial use,

these rights dated back to 1902."

In response to the petition for rehearing, the *Alpine III* panel modified its opinion so that the final paragraph of Section IV now reads:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060. n4

The panel thus rejected the argument that all appropriations were initiated in 1902, and remanded for individual determinations.

B. Abandonment

[3] In addition to claiming that some of the water rights at issue in this case have been forfeited under Nevada statutory law, the Tribe also claims that some of them have been abandoned under Nevada common law. Under Nevada law, abandonment is "the relinquishment of the right by the owner with the intention to forsake and desert it." *Manse Spring*, 108 P.2d at 315. Abandonment thus requires a showing of subjective intent on the part of the holder of a water right to give up that right.

Subjective intent is difficult to prove by direct evidence. Few water-right holders say in front of witnesses, "I intend to abandon my water rights." Therefore, indirect and circumstantial evidence must almost always be used to show abandonment. Many states have adopted legal presumptions designed to ease the burden upon the challenger and to increase the likelihood that water will be put to beneficial use. In particular, nearly all western states presume an intent to abandon upon a showing of a prolonged period of non-use. *See, e.g., Okanogan Wilderness League, Inc., v. Town of*

Twisp, 947 P.2d 732, 739 (Wash. 1997); *In re Clark Fork Drainage Area*, 908 P.2d 1353, 1356 (Mont. 1995); *Consolidated Home Supply Ditch and Reservoir Co. v. Town of Berthoud*, 896 P.2d 260, 266 (Colo. 1995); *State ex rel. Reynolds v. South Springs Co.*, 452 P.2d 478, 482-83 (N.M. 1969); *Yentzer v. Hemenway*, 440 P.2d 7, 13 (Wyo. 1968); *Utt v. Frey*, 39 P. 807, 809 (Cal. 1895).

The State Engineer ruled in this case, however, that Nevada does not include such a presumption in its common law of abandonment, and that the Tribe could not therefore shift the burden of proof to require Fernley to show affirmatively that there was no intent to abandon merely by showing a prolonged period of non-use. The district court agreed. While we consider the State Engineer's interpretations of Nevada statutes "persuasive," they are not controlling. We review the district court's conclusions of law *de novo*. *See Alpine II*, 878 F.2d at 1222; *Town of Eureka v. State Engineer*, 826 P.2d 948, 949 (Nev. 1992). On *de novo* review, we agree with the district court.

[4] Under Nevada case law, a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned, *see Manse Spring*, 108 P.2d at 316, and non-use "may inferentially be some evidence of an intent to abandon." *Franktown Creek*, 364 P.2d at 1072. But Nevada law goes no further than an inference. It is only a matter of degree, but a legal presumption is stronger than an inference. None of the cases cited by Fernley explicitly disclaims a presumption, but neither the Tribe nor the government cites any Nevada decision in *Alpine III*, where we stated "[t]hough the longer the period of nonuse, the greater the likelihood of abandonment, we find no support for a rebuttable presumption under Nevada law." 983 F.2d at 1494 n.8; *see also Alpine IV*, 27 F. Supp. 2d at 1242. We acknowledge that Nevada appears to be the only western state that maintains this position, but in our federal system it is entitled to do so. n5

[5] On appeal to this court, the Tribe asserts that the State Engineer was wrong to consider payment of operation and

maintenance fees as sufficient evidence to support a finding that the particular water rights had not been abandoned. According to the Nevada Supreme Court, abandonment is to be determined "from all the surrounding circumstances," and those circumstances certainly include the payment of assessments and taxes. *Revert v. Ray*, 603 P.2d 262, 264 (Nev. 1979); *see also Alpine IV*, 27 F. Supp. 2d at 1243. But payment of fees is not the only factor to be considered when there is conflicting evidence on the issue of abandonment. Other important circumstances to be considered include non-use of the water right, *see Franktown Creek*, 364 P.2d at 1072; *Manse Spring*, 108 P.2d at 316, and the construction of structures incompatible with irrigation. *See* Nev. Rev. Stat. § 533.045 ("When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of this state except at such times as the water is required for a beneficial purpose."). In order to guide the district court and the State Engineer in this and other abandonment proceedings, we endorse the district court's statement in *Alpine IV*:

> Where there is evidence of both a substantial period of nonuse, combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. If, however, there is only evidence of nonuse, combined with the finding of a payment of taxes or assessments, the court concludes that the Tribe has failed to provide clear and convincing evidence of abandonment.

27 F. Supp. 2d at 1245.

IV. Application of the Law of Forfeiture and Abandonment

A. Forfeiture

As explained above, the State Engineer ruled that, for purposes of Nev. Rev. Stat. § 533.085, the water rights at issue all have an initiation date of 1902. He therefore found that

none of the water rights is subject to forfeiture under § 533.060. The Engineer also made alternate findings based on the assumption that the water rights were not initiated in 1902 and were therefore subject to forfeiture.

In his alternative findings, the Engineer assumed that the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19, and 20 were not protected from forfeiture. Accordingly, the Engineer examined evidence introduced by the Tribe to determine if any of these eight water rights were not exercised during "any 5 successive years." Nev. Rev. Stat. § 533.060. The Engineer evaluated the evidence presented for these parcels and concluded that only one of the appurtenant water rights had been forfeited. As to the others, he found that the Tribe had failed to prove the statutory period of non-use "by clear and convincing evidence." *Town of Eureka*, 826 P.2d at 952.

The district court did not review the Engineer's alternative findings with respect to forfeiture because it agreed with the Engineer that the only applicable legal theory was abandonment. We are reluctant to review the Engineer's findings without allowing the district court to do so first. Even if we were willing to conduct such a review, however, we could not do so on the record before us. While the record includes the Engineer's ruling, it does not contain the evidence introduced in the proceeding before the Engineer. We therefore remand to the district court. On remand, the district court will have the opportunity to review the Engineer's forfeiture findings on a parcel-by-parcel basis, and to incorporate into the district court record the evidence submitted to the Engineer relevant to those findings.

Despite the limitations imposed by the current state of the record, it may be appropriate for us to comment on what we do have before us. We are concerned that the Engineer may have misunderstood the "clear and convincing evidence" standard necessary to establish forfeiture. For example, we note his ruling that the Tribe failed to prove by clear and convincing evidence that the water rights appurtenant to Parcel 1 have been forfeited. The Engineer acknowledged

that the Tribe introduced evidence that the parcel had been described as "bare land, prepared for cultivation" (based on interpretations of aerial photographs) in 1949, 1973, and 1977; simply as "bare land" (based on an infrared aerial photograph) in 1984; and as "bare land, buildings, and roads" in 1991. Another aerial photograph taken in 1993 showed no evidence of irrigation. Testimonial evidence indicated that the farm located on Parcel 1 was "in disrepair" and was "not organized or prepared for cultivation." The Tribe also introduced a map, prepared by the Bureau of Reclamation, which showed that Parcel 1 had not been irrigated in any of the years between 1984 and 1989.

The Engineer's ruling does not refer to any contrary evidence, yet he concluded that the Tribe had failed to establish by clear and convincing evidence that the water rights appurtenant to Parcel 1 had been forfeited. In support of his conclusion, he wrote that there was no evidence of non-use in the years between the aerial photographs, that the Bureau map could be unreliable, that the aerial photographs may have been wrongly interpreted, and that the on-the-ground surveys were not performed frequently enough. In so concluding, the Engineer does not appear to have required only clear and convincing evidence. *See Albert H. Wohlers & Co. v. Bartgis*, 969 P.2d 949, 957 n.4 (Nev. 1999) (approving jury instruction describing clear and convincing evidence as "evidence which is beyond a mere preponderance of the evidence"); *accord Topaz Mutual Co., Inc. v. Marsh*, 839 P.2d 606, 609 (Nev. 1992). He appears to have demanded proof beyond a reasonable doubt, and perhaps even more than that. Our review of the Engineer's forfeiture rulings on other parcels suggests that his evaluation of the Tribe's evidence with respect to those parcels may also have gone beyond a requirement of clear and convincing evidence.

B. Abandonment

The Tribe argued before the Engineer that some of the water rights in question were abandoned under Nevada common law. As we have noted above, the Engineer ruled correctly that Nevada law does not include a legal

presumption in favor of abandonment based on a showing of prolonged non-use. He then stated, with respect to water rights subject to abandonment:

> Permanent improvements, such as farm buildings, roads and canals, have been constructed on some of the parcels. The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights. However, the Tribe presented no evidence or testimony relating to the intent to abandon these water rights.

The Engineer noted that the Town of Fernley had "kept the rights in good standing" by paying the applicable fees for water delivery, and that "no evidence in the record indicat[es] that any previous owner failed to pay the assessments or in any way displayed an intent to abandon or forsake these water rights." He then found that none of the water rights in question had been abandoned.

In appealing the Engineer's findings, the Tribe and the federal government argued that he failed to consider evidence of abandonment they had introduced. In particular, they argued that evidence of prolonged non-irrigation combined with evidence of improvements inconsistent with irrigation needs (for example, buildings) were sufficient to show that water rights appurtenant to a given parcel of land had been abandoned. The district court rejected their arguments, but did not review the evidence on a parcel-by-parcel basis in its order, stating only that the Engineer "did not ignore the Tribe's evidence."

The State Engineer's findings concerning abandonment are reviewed in federal court to determine whether they are supported by "substantial evidence." *See Revert v. Ray*, 603 P.2d at 264. We cannot determine from its order whether the district court reviewed the Engineer's findings for conformity with Nevada abandonment law, as articulated by Nevada statutes and case law and by the district court in *Alpine IV*. We are also unable to review those findings because the

evidence introduced in the proceeding before the Engineer has not been incorporated into the district court record that is now before us. We therefore remand for further proceedings. On remand the district court will have the opportunity to review, on a parcel-by-parcel basis, the evidence before the Engineer to determine whether it supports his findings on abandonment, and to include in the record the relevant evidence presented to the Engineer.

As with his forfeiture findings, we think it may be appropriate to comment briefly on the Engineer's abandonment findings. From his written findings, it appears that the Engineer may have misapplied Nevada's clear and convincing evidence standard in finding no abandonment, just as he appears to have done in finding no forfeiture. For example, the Tribe and federal government introduced a substantial amount of circumstantial evidence showing that the water rights appurtenant to Parcel 10 had been abandoned. This evidence included aerial photographs taken in 1949, 1973 and 1977 showing that Parcel 10 was "bare land"; descriptions of the land in 1984 and 1991 indicating that it was not being used for agriculture; and a photograph taken in 1993 showing that the land had been converted to a residential subdivision. The Engineer nevertheless ruled that there was no "clear and convincing evidence" that the water rights appurtenant to Parcel 10 had been abandoned, even though there was no contrary evidence to show that those rights had ever been exercised. As with the Engineer's findings with respect to forfeiture, these findings appear to rest on a standard of proof higher than "clear and convincing evidence."

Conclusion

We reverse the decision of the district court and remand for further proceedings consistent with this opinion.

NOONAN, Circuit Judge, dissenting:

In 1902, the United States initiated the appropriation of the water rights here in dispute by the enactment of the

Reclamation Act. *See Nevada v. United States*, 463 U.S. 110, 115-117 (1983). In so doing, the United States acted as trustee on behalf of the later individual owners of land within the Reclamation Project. *Id.* at 126. These water rights were consequently not subject to forfeiture and can now be transferred as the State Engineer and the district court ruled. In reaching the result it does, the majority silently but effectively departs from what the Supreme Court of the United States has already determined.

There cannot be any argument that when the United States began the Newlands Reclamation Project in 1902, it initiated the appropriation of the relevant water rights. Nothing prior to the enactment of the 1902 statute initiated the appropriation. Anything after 1902 merely carried out what had begun in 1902. This year was accordingly the priority date for ownership of the water rights, and the Reclamation Act was the first step in establishing beneficial ownership of the water for the individual landowners. Their rights relate back "to the time when the first step was taken to secure [them]." *Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 543-44 (1869). The water rights are not forfeitable "where the appropriations of the right have been initiated in accordance with law prior to March 22, 1913." Nev. Rev. Stat. § 533.085.

Why is it that the majority does not reach this conclusion? First, because it misinterprets *Alpine III*. That case was about vesting; this court reversed the State Engineers's erroneous determination that water rights had vested in 1902. *Alpine III*, 965 P.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it), the court amended its disposition to remand the question of initiation. *Alpine III, as amended*, 983 F.2d 1487, 1496 (9th Cir. 1993).

The majority engages in the speculation that the purpose of the Nevada anti-forfeiture statute was to exempt "investment–backed expectations." Nothing in the language of the statute evinces this purpose. Where initiation of appropriation is begun there is no investment. There is

merely an assertion of title. As the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investment.

The majority admits that in 1902 "the United States initiated the water rights for the entire Newlands Project." The majority's second error is implicitly to suppose that the Nevada legislature used "initiation of appropriation" to mean something different from the first step in the process of acquiring a water right. It makes perfect sense for the Nevada legislation to protect the Nevada individuals for whom the United States acted. It makes no sense to suppose with the majority that initiation of appropriation means one thing for purposes of priority and a very different thing for purposes of protection from forfeiture under § 533.085.

I concur with the court in its ruling on abandonment. I believe that its ruling on forfeiture misinterprets *Alpine III*, Nevada law, and what is at least implicit in *Nevada v. United States, supra.*

FOOTNOTES TO APP. A

n1 Congress authorized municipal use of Project waters in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act. Pub. L. No. 101-618 § 209(a)(1), 104 Stat. 3289 (1990).

n2 We note that Nevada has recently revised Nev. Rev. Stat. § 533.060 and Nev. Rev. Stat. § 533.037, pertaining to forfeiture and abandonment. These revisions, however, do not affect this case because they do not apply to water rights that have been challenged in a legal or administrative proceeding pending on or before April 1, 1999. Moreover, neither statute "constitute[s] a legislative declaration that the law to be applied in any such pending proceeding is different from or the same as set forth in this act." *See* Section 7 of ch. 15, Statutes of Nev. 1999, at 2364.

n3 For ease of reference in this opinion, we will refer to the version of Nev. Rev. Stat. § 533.060(2) in effect before the 1999 amendments to that statute without specifically noting that we are referring to the pre-1999 version. The statute, as it existed before 1999, provides:

> Except as otherwise provided . . . if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed, and any qualified person may appropriate any such

water for beneficial use.

n4 The underlined portions of the paragraph were added or altered in the amended version of *Alpine III*.

n5 Nevada has recently reaffirmed its commitment to a limited view of the law of abandonment. As amended in 1999, Nev. Rev. Stat. § 533.060(4) now states (emphasis added):

> In a determination of whether a right to use surface water has been abandoned, a presumption that the right to use the surface water has *not* been abandoned is created upon the submission of records, photographs, receipts, contracts, affidavits or any other proof of the occurrence of any of the following events or actions within a 10-year period immediately preceding any claim that the right to use the water has been abandoned: (a) The delivery of water; (b) The payment of any costs of maintenance and other operational costs incurred in delivering the water; (c) The payment of any costs for capital improvements, including works of diversion and irrigation; or (d) The actual performance of maintenance related to the delivery of the water.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

ORR WATER DITCH DO., *et al.*,
Defendants.

Matter of Nevada State Engineer Ruling No. 4116, re: Application 56226

Case No. (Equity) A-3-LDG

ORDER

May 11, 1999, Decided
May 13, 1999, FILED; May 14, 1999, ENTERED & SERVED

The Pyramid Lake Paiute Tribe of Indians (the Tribe) and the United States of America (collectively the Appellants) each appeal the Nevada State Engineer's Ruling No. 4116 (#62, #63). The State Engineer, the Town of Fernley, and the Truckee-Carson Irrigation District (Irrigation District) have filed oppositions, and the United States and the Tribe have replied.

Brief Factual Background

On July 2, 1902, the United States commenced the Newlands Reclamation Project, withdrawing over 200,000 acres of land in the vicinity of Fallon, Nevada. With due diligence, the United States thereafter commenced and proceeded with the construction of the related irrigation

works necessary to irrigate this land. Initially, and pursuant to the Reclamation Act, Project water was intended to be used primarily for irrigation, but could also be used for watering livestock and for domestic purposes. In 1990, Congress enacted the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Public Law 101-618 §200 *et al.*, (the Settlement Act). Section 209(a) of the Settlement Act expressly permitted Project water to be used for municipal purposes.

Fernley purchased water rights to about 280 acre-feet of Project water from various landowners and applied to the State Engineer to change the manner and place of use of these newly purchased water rights from irrigation to municipal use. The United States and the Tribe protested Fernley's application. Following a briefing, a hearing, and post-hearing briefs, the State Engineer approved Fernley's application. The parties have briefed this matter and the matter is now before the Court.

Issues on Appeal

Stated succinctly, the Appellants raise the following issues on appeal.

1. Whether the State Engineer erred in failing to recuse himself?

2. Whether the State Engineer erred in not requiring approval of the Secretary of the Interior as a prerequisite to any approval by the State Engineer?

3. Whether the Secretary of the Interior allocated water rights to each of the existing places of use identified on Fernley's Application?

4. Whether the State Engineer erred in finding that the water rights purchased by Fernley are currently valid? Stated otherwise, did the State Engineer err in finding that the subject water rights had been perfected, were not abandoned and were not subject to forfeiture? n1

In considering these issues, the Court presumes that the State Engineer's factual findings are correct, with the burden to show otherwise resting upon the party attacking the State

Engineer's ruling. N.R.S. §533.450(9). This Court reviews whether the findings are supported by substantial evidence and determines whether the State Engineer's findings are an abuse of discretion. *Town of Eureka v. State Engineer,* 108 Nev. 163, 165 (1992). This Court does not weigh the evidence or substitute its opinion for that of the State Engineer. The State Engineer's interpretation of law is reviewed *de novo. Id.*

Recusal of State Engineer

Both Fernley and the State Engineer argue that the Tribe cannot raise this issue on appeal because it failed to properly raise this issue below. The Tribe counters that it properly raised this argument to the State Engineer at a pre-hearing status conference, but that the State Engineer failed to address the issue in this ruling.

A review of the transcript of the pre-hearing status conference indicates that the Tribe stated that it was raising its "standing motion" to disqualify the State Engineer. In response, the Hearing Officer stated that the motion should be raised at the hearing, not the status conference. The Hearing Officer further noted that the Tribe intended to move to recuse the State Engineer at the hearing and that he would consider a motion to recuse made during the hearing. However, the Tribe did not follow through on its intention; it did not move to recuse the State Engineer during the hearing. Accordingly, the Tribe waived its right to argue that the State Engineer should have recused himself by failing to properly raise the motion during the hearing below.

Approval of the Secretary of the Interior

The United States argues that the approval of the Secretary of the Interior is a prerequisite to the State Engineer's approval of the proposed transfer and change of use of the Project water rights at issue. In his ruling, the State Engineer stated only that, prior to changing the manner and place of use of the water, Fernley must comply with applicable federal law.

The United States offers two theories in support of its argument. First, the Government asserts that its approval is

required because it is the "legal owner" of the water rights. Second, the Government suggested that §209 of the Settlement Act requires that Fernley obtain the Secretary's approval of the proposed change before seeking the State Engineer's approval.

In response, Fernley, the Irrigation District, and the State Engineer suggest that the United States does not have any ownership interest in the water rights. Alternatively, if the United States does have an ownership interest, such interest is "at most minimal" and does not include a right to prohibit the beneficial and equitable owner of the water right from changing the place and manner of use pursuant to state law. These parties also point out that the United States has failed to identify any statute or other provision of law that either expressly requires the approval of the Secretary or requires that approval **prior** to the State Engineer's approval of the transfer application.

The United States' argument fails for several reasons. First, the United States' ownership rights in the water rights at issue are "at most minimal." *Nevada v. United States*, 463 U.S. 110, 126 (1983). These "minimal" ownership rights do not provide the United States the right to require the beneficial and equitable owner of a water right seeking to transfer the water right to obtain the approval of the United State prior to seeking the approval of the State Engineer. Second, the State Engineer did not rule that it was not necessary for Fernley to obtain approval from the United States. Rather, he ruled that Fernley was required to comply with all federal law regarding the proposed transfers.

Third, §209 of the Settlement Act fails to provide support for the United States' position. Nothing in the language of §209 expressly requires that a beneficial owner of a water right first obtain the approval of the Secretary before submitting a transfer application to the State Engineer. Rather, §209 more appropriately appears to be an expression by Congress that the United States has consented and approved beneficial owners of Newlands Project water rights changing the manner of use of their water right from

irrigation to municipal uses. Finally, the Court notes that the United States has not indicated the procedure by which an owner of a Project water right is to obtain the consent of the United States prior to seeking the State Engineer's approval to transfer the place of use. In total, the Court finds that the State Engineer did not err in ruling that Fernley was required to comply with all applicable federal law prior to actually changing the manner and place of use of the water rights at issue.

Allocation of Water Rights to the Places of Use Identified in Fernley's Transfer Application.

The United States argues that Fernley failed to establish that the specific water rights they purchased were appurtenant to specific Project land. Although the Government generally raises this issue as to Parcels 1 - 5, 7 - 12, and 15 - 28, its arguments are premised only upon the water rights deed related for Parcel 16. As such, the Court will consider the United States' argument only as to Parcel 16.

The Government's argument is not based upon evidence admitted at the hearing before the State Engineer. While a witness testified at the hearing that the water right deed for Parcel 16 identified the specific land to which rights were appurtenant, none of the parties offered the deed itself as evidence. Rather, only after the hearing did the United States first examine the water rights deed for Parcel 16. As a result of this belated examination, the United States concluded that the deed does not specifically identify the appurtenant land. Given that the United States failed to argue or present any evidence on this issue to the State Engineer, the Court cannot find error in the State Engineer's ruling.

Current Validity of the Water Rights

State Engineer's Conclusion that Nevada's Forfeiture Statute Does Not Apply

The threshold question before the Court is whether the State Engineer correctly found that each of the individual water rights vested on July 2, 1902. Having carefully

reviewed the entire record, and the history of the Orr Ditch litigation, the Court finds that the State Engineer did not err. In the Orr Ditch Final Decree, the court awarded a July 2, 1902, priority date for all individual water rights within the Newlands Project governed by the Decree. Accordingly, as the July 2, 1902, priority date is the law of the case, the State Engineer could not err when he applied this priority date in considering these change-of-use applications. Further, this conclusion is consistent with the Supreme Court's decision in *Nevada v. United States*, 463 U.S. 110 (1983), in which the Court determined that all water rights for the Truckee were adjudicated by the Orr Ditch Final Decree. Finally, finding that each individual Project water right has a July 2, 1902, priority date is consistent with water law in general, and with Nevada water law in particular.

Proper resolution of the issue whether the State Engineer erred requires recognition that the priority of water rights, including Project water rights, was a core issue in the Orr Ditch litigation from the filing of the original complaint. The United States initiated the litigation in 1913, "as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the water of the Truckee . . . and required all parties to fully set up their respective claims." *Nevada*, 463 U.S. at 120. The United States expressly alleged that it sought a judicial resolution of the priority of water rights for the Truckee River. As stated by the Government in its amended complaint,

> Until the several rights of the various claimants, parties hereto, including the United States, to the use of the waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, *and order in time of each right* to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could

be protected would necessitate a multiplicity of suits.

Amended Complaint (emphasis added). Further, as noted by the Supreme Court, "the primary purpose of the Government in bringing the Orr Ditch suit in 1913 was to secure water rights for the irrigation of land that would be contained in the Newlands Project. . . ." *Nevada*, 463 U.S. at 121.

The United States, in essence, asked the court in 1913 to place every user of Truckee River water in a line and, when placing those users in the line, to place them in the order that they were allowed to take water. n2 The benefits of creating such a line are obvious. First, those persons standing in line will be limited to only those users who have already obtained, or who are in the process of obtaining, a right to take water. All other persons wanting to take water, but who had not yet commenced the process of obtaining a right to take water, would have to go to the end of the line when they started the process of appropriating water. Second, the water users placed at the front of the line would be secure in the knowledge that they would get water from the river in even the driest of years. In contrast, although users placed at the back of the line would have less assurance of receiving water in dry years, these lower priority users could plan accordingly. In short, the creation of the line allows all users of the river water to rely on the line, and their relative placement in line, to plan their individual activities. Third, and as a result of the above, each water right gains a relative value according to a user's place in line. For example, persons that did not have a place in line, but who wanted to purchase a spot in line, would know that a water right at the front of the line would be more valuable than a water right at the back of the line. Similarly, those at the front of the line would know that their rights would be sought after by persons waiting to obtain water rights.

Each of these factors is revealed in the United States' complaint initiating the stream adjudication. First, the United States sought to secure spots in the line on behalf of the Tribe and the Newlands Project that it had initiated in

1902. Second, the United States would obtain a spot for the Tribe near the front of the line, while it would obtain a spot on behalf of the Newlands Project only slightly further back. Both of these positions were sufficiently close to the front of the line, however, that the Tribe and the farmers in the Project would be assured of obtaining water every year. Finally, by gaining a favorable placement for water designated for the Newlands Project, the United States ensured the likelihood of success for the Project. Farmers buying land from the United States within the Project would also be purchasing the water right appurtenant to the land that would permit the farmers to stand near the front of the water line, a right essential to the successful farming of the land. (Indeed, given the arid conditions of the region, land is effectively useless for farming if the land lacks a water right.) Each of these benefits was realized when, in 1940, the court entered the Orr Ditch Final Decree judicially recognizing and creating a line for Truckee River water, and finally determining each and every user's place in that line.

The value of judicially forming and recognizing a line for water, and the reliance of all water users on the judicial recognition of that line, is sufficiently great that the Supreme Court has held that even those persons who were **not** standing in the line created by the Orr Ditch Final Decree nevertheless have standing to enforce the Decree. In *Nevada*, the Tribe filed a complaint seeking to obtain an additional place near the very front of the Orr Ditch water line for an implied-reservation-of-water to maintain the Pyramid Lake fishery. The Supreme Court held that the Tribe's complaint was precluded by res judicata. Every place in the line, the Supreme Court noted, including a spot for the Tribe's implied-reservation-of-water right for fishing, was litigated in the Orr Ditch litigation. Further, the Supreme Court held that even post-Final Decree appropriators, those persons who did not take a place in the Orr Ditch line until after the line had been judicially recognized by the Decree, could enforce the Final Decree as against the Tribe. As a result, if the Tribe wished to divert additional water to maintain the fishery, it

would have to go not merely to the end of the line as judicially recognized in the Final Decree, but would also have to stand in line after every post-Decree appropriator. Thus, by judicially creating and recognizing the line, every person standing in the line has the right to enforce the line and to stop non-righted water users from cutting into line.

In addition, every person standing in line can enforce the line by removing users who lose their right to use water from the line. Indeed, the effort to remove users from the Truckee water line is at the heart of the present review. In recent years, including the present matter, the United States and the Tribe have engaged in an effort to remove from the water line every user who has allegedly lost his right to stand in line. With each user removed from the line, the line becomes shorter and the possibility of obtaining water by users standing at the end of the line is increased. Presumably, after *Nevada*, the Tribe has placed itself, or is seeking to place itself, as one of the those users at the end of the line waiting for Truckee River water.

One method of removing a user from a water line is to show that the user has lost his spot in the line by forfeit. A water right, that is, a spot in the water line, is forfeited when the owner of that right fails to exercise his right to take water for five consecutive years, regardless of whether the owner intended to give up his spot in line to take water. Under Nevada law, however, only those spots in line after the critical date of March 22, 1913, are subject to forfeiture. *In Re Waters of Manse Springs*, 60 Nev. 280, 290, 108 P.2d 311 (1940). Any spot in line prior to March 22, 1913, is subject only to abandonment. Unlike forfeiture, to remove a user from the water line for abandonment requires showing not only that the user has not taken water, but that the user intended to abandon his spot in line. Thus, given the less-onerous and burdensome nature of showing forfeiture, the Tribe and the United States would prefer to attempt to remove users for forfeiture. Nevertheless, the Tribe and the United States can seek to apply forfeiture to a user only if that user's place in

line is behind March 13, 1913, and therefore subject to forfeiture.

The preference to remove users by forfeiture explains the Tribe's and the United States' argument that the State Engineer erred when he found that every individual Project landowner has a priority of July 2, 1902. In terms of the analogy to the water line, the State Engineer concluded that each farmer was standing in line on the July 2, 1902, spot that the United States obtained on behalf of the farmers for the specific and express purpose of irrigating the Project farm lands. The State Engineer's finding effectively precludes the Tribe and the United States from removing any Project landowner under the forfeiture standard. In this review, the Tribe and the United States assert that the State Engineer should have placed the individual farmers onto the spot corresponding with the date they took their first step to obtain a water right-to obtain a spot in the line—from the United States. The appellants expect that, when the individual users are placed in line according to the date they first sought a water right from the United States, many of the farmers will be placed behind the critical March 22, 1913, spot.

The argument that the State Engineer erred in placing the individual Project landowners on the July 2, 1902, spot, however, assumes that the farmers were not already standing on that spot pursuant to the Orr Ditch Final Decree. The assumption does not withstand scrutiny. Admittedly, the Final Decree does not expressly identify any Project farmer or landowner by name, or expressly assign a specific water right or priority date to any individual Project landowner. Neither does the Final Decree refer to individual Project water rights. Although the farmers are not expressly named or otherwise identified in the Orr Ditch Final Decree, each farmer has obtained a right to stand in line from the United States. In effect, the United States transferred to each landowner a portion of the right to stand in the Orr Ditch water line that the court awarded to the United States. In turn, as relevant to the Newlands Project, the United States obtained its right to

stand in line pursuant to Claim No. 3. As awarded in the Orr Ditch Final Decree,

> Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the [United States] is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project. . . .

Orr Ditch Final Decree, at 12. This language is clear, the United States was given a July 2, 1902 spot in line to divert water at the rate of 1500 cubic feet per second for the irrigation of Project lands. n3 The United States then transferred, (and had already transferred), portions of its July 2, 1902, spot in line to individual Project farmers so that they could actually receive water and irrigate the Project lands, as required by the award. Thus, as each individual landowner claims his right to stand in line pursuant to the award of that right in Claim No. 3, each landowner benefits from the awarded priority date of July 2, 1902.

The language of the Final Decree provides further evidence that each Project landowner is already standing on the July 2, 1902 spot in the Orr Ditch water line. The water rights awarded in Claim No. 3 are expressly "for the irrigation of 232,800 acres of lands on the Newlands Project," and other beneficial uses. As Congress recognized in the Reclamation Act, "beneficial use shall be the basis, the measure, and the limit of the right" to use water acquired under the Act, including the Newlands Project. Just as beneficial use is the measure of the extent of a water right, a user can stand in line and divert water only if the water diverted will be placed to beneficial use. This concept is not surprising. Water that is diverted but not placed to a beneficial use is wasted, precluding its beneficial use by another user standing farther back in line who would not otherwise receive water. Only those persons that beneficially

use water have the right to stand in line. In this case, the beneficial users of Project water are the Project landowners, not the United States; the Project landowners apply the water that is diverted to irrigate Project land. Absent the Project landowners and other approved users of Project water, the water diverted pursuant to Claim No. 3 would be wasted. Thus, in contrast to the United States' "at most minimal" right to the July 2, 1902, spot in line, the Project landowners clearly stand on that spot as the beneficial users and owners of the water rights, allowing them to receive the water that the Orr Ditch Final Decree designated for the irrigation of Project lands.

Finally, and perhaps most significantly, both the United States and the Tribe are expressly enjoined by the Orr Ditch Final Decree from asserting that the individual Project landowners have a priority date other than July 2, 1902. As recognized by this Court in the Orr Ditch Final Decree, the Decree binds not only the original parties to Orr Ditch litigation, but also binds any and all persons claiming a water right adjudicated by the Final Decree.

> That the parties, persons, corporations, interveners, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights specified, determined and allowed by this decree . . ."

Orr Ditch Final Decree, at 10 (emphasis added). The Supreme Court has specifically recognized that the Decree is binding upon not only the United States, but also the Tribe and the

Project landowners. "We hold that under the circumstances described above, the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the Orr Ditch suit." *Nevada*, 463 U.S. at 143. In this case, all parties, including the Tribe and the United States, are enjoined from asserting that the water rights being exercised pursuant to Claim No. 3 have a priority other than July 2, 1902. Indeed, even the Project landowners are enjoined from asserting that the priority date for their water rights is other than July 2, 1902. Stated simply, the Final Decree enjoins all users of Truckee water from disputing or arguing that those persons who take water pursuant to Claim No. 3, which includes the individual Project landowners whose rights are at issue in this matter, are not standing on the July 2, 1902, spot in line. Thus, the Court finds that the State Engineer did not err in finding that each individual Project water right has a priority of July 2, 1902.

Nevertheless, the Court is cognizant of the several arguments that have been raised suggesting that the priority date for individual Project water rights has not been determined. One such argument is that the priority date for individual Project water rights should be measured from the date that the individual Project farmers took the first steps to obtain water from the United States. In essence, the argument is made that Project landowners taking irrigation water pursuant to Claim No. 3 should not be placed on the July 2, 1902, spot that the United States obtained for the purpose of irrigating Project land, but should be placed elsewhere in line.

The United States initiated both the Orr Ditch litigation and the Alpine litigation for the express and specific purpose of securing a priority date, a spot in line, that it would be transferring to individual farmers. As has been discussed above, the Orr Ditch Final Decree granted the relief sought by the United States, awarding a July 2, 1902, priority date for the irrigation rights within the Newlands Project, which award is binding upon all users of Truckee River

water, including the United States, the Tribe, and the individual farmers.

In the Alpine litigation, the court's placement of the individual Project landowners onto the July 2, 1902, spot in line is even clearer. The court awarded the July 2, 1902, priority date to the individual Project land owners as follows:

> The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. These rights have a priority of July 2, 1902. The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lien-holder's interest to secure repayment of the project construction costs.

United States v. Alpine Land & Reservoir, 503 F.Supp. 877, 879 (D.Nev. 1980). That this holding was not challenged, and thus became final, is not surprising since the parties to the Alpine litigation agreed, before trial, that the priority date of the individual Project landowners' water rights was July 2, 1902. *Id.*, at 885. In effect, all parties, including the United States and the Tribe, agreed to resolve a core issue of the Alpine litigation, as alleged by the United States in its complaint, as to where the individual farmers were standing in the line for Carson River water.

The suggestion remains, however, that the Alpine Court's final judgment awarding the farmer's a July 2, 1902, spot in line somehow did not resolve the issue of the farmer's proper place in line, because the parties settled rather than litigated this core issue. This Court is extremely concerned by the suggestion, as it calls into question the validity of every final judgment this Court has entered as a result of the parties settling, rather than litigating, claims alleged in the complaint. As in the Orr Ditch litigation, the United States initiated the Alpine litigation to finally resolve the dispute as to each Project farmer's place in line for Carson River water.

The parties agreed to the July 2, 1902, priority date for the very purpose of resolving this claim.

The Court recognizes that the suggestion, (that the parties' settlement agreement did not resolve the issue of the farmer's proper place in line), arises from the fact that the agreed-upon priority date of July 2, 1902, was also material in resolving **another** of the United States' claims brought in the Alpine Complaint: each farmer's water duty, the amount of water to which each farmer was entitled. The United States argued that the water duty was governed by the 1903 Cooperative Act. The trial court noted, however, that the 1903 Cooperative Act did not apply because the water rights for individual farmers had priority dates of July 2, 1902, as stipulated by the parties before trial. If this stipulation is considered only in the context of the United States' water-duty claim (thereby ignoring the context of the overall litigation, including the United States' priority claim), then one can reach the erroneous conclusion that the parties agreed to the priority date solely for the purpose of resolving the applicability of the 1903 Cooperative Act to the amount-of-water dispute. In turn, this leads to the incorrect suggestion that the Project landowner's place in line was not resolved by the Alpine Final Decree.

Nothing in the record of the Alpine litigation indicates that, in agreeing upon a priority date, the parties did not intend to actually resolve the core issue of the landowner's priority. Similarly, the record of the Alpine litigation lacks any suggestion that the sole purpose in reaching this agreement was to resolve whether the 1903 Cooperative Act governed the amount-of-water dispute. The Court cannot find any agreement or language in the Alpine record indicating that the parties intended to reserve litigation of the issue of priority despite agreeing that the priority date was July 2, 1902. Further, this Court cannot discern any language in the Alpine Final Decree indicating that, in accepting the parties' settlement agreement, the Alpine trial court believed that the parties were not resolving the core issue regarding the correct priority date for Project landowners. Instead, the

Alpine Final Decree indicates that the parties agreed to the Project landowner's priority date for the purpose of resolving the issue of the priority date. That the priority date was **also** relevant to the trial court's resolution of another claim raised by the United States in its complaint—the extent of each Project landowner's water duty—does not render the agreement meaningless on the issue that the parties intended to resolve when they entered into the stipulation: the priority date for each farmer's water right.

Project-Wide Rights

The Court would also note the suggestion that, as regards Project water rights, the Alpine and Orr Ditch Final Decrees determined only project-wide rights. Pursuant to this suggestion, individual rights, including individual priority dates for water rights within the Newlands Project, have not yet been determined. This suggestion appears to be based upon the following language from *Alpine II*:

> The governing decrees resulting from these proceedings [the Orr Ditch and Alpine litigations] deal with the Project as a whole. While these previous proceedings have settled many issues, they have not determined whether the particular Project properties involved in this case are entitled to receive Project water.

878 F.2d at 1220-21. While this observation is correct, the suggestion that priority dates have not been determined rests upon an impermissible extrapolation of this observation. Whether particular Project property is entitled to receive water requires resolution of the question, "Does a water right exist for this specific piece of Project land?" The appellate court correctly observed that this question has not yet been answered. In contrast, the priority date of a water for a particular Project property requires resolution of a very distinct question, "If a valid water right **exists** for a particular property, what are its parameters?" The suggestion that the priority date has not been determined confuses these very distinct questions. Indeed, neither the Orr Ditch nor the

Alpine Decree could appropriately answer the former question as to the existence of a right for specific Project property.

The United States filed its complaints on behalf of the Project farmers. This limited the United States to seeking determinations of only those issues applicable to the water rights of all Project farmers such as the priority date and the water duty. As shown by the allegations of the complaint, and as established in the Decrees, these issues were litigated and resolved. In addition, resolution of these issues was beneficial to all non-Project water users. Non-Project users would know the maximum amount of water that could be appropriated by Project farmers, and would know the spot where the Project farmers' stood in the water line.

In contrast, resolution of the question whether a water right exists, whether a farmer has the right to stand in line for a specific piece of Project land, depends primarily upon three factors. Recognition of these three factors shows that the question whether a right actually existed for a particular piece of Project property, as opposed to the question of the parameters of Project water rights, could not be adequately resolved by either Decree. First, the existence of a water right requires a determination whether a Project farmer obtained, from the United States, a right to stand in line for the specific Project property. As noted in *Alpine II*, "[t]he rights of particular properties to receive Project water are based on contracts and certificates issued by either the Secretary or the Truckee-Carson Irrigation District (TCID)." While this issue might have been resolved as to some properties in the Decrees, the court notes that both the Orr Ditch and the Alpine litigations were initiated while the United States was still in the process of transferring water rights. As a result, resolution of whether the farmer had obtained a valid water right for particular Project property was premature as to most of the Project properties when the United States filed it complaints. Further, the identity of the specific pieces of property that would receive water was not critical or relevant as to non-Project users standing in line for water. Critical to

non-Project users of Truckee water was the determination of the maximum amount of water that could be diverted by Project farmers, and the priority date pursuant to which the farmers could divert that amount of water. The Orr Ditch Decree provided this critical information as 1500 cfs of water with a priority of July 2, 1902. The Alpine Decree provided this critical information as 3.5 or 4.5 afa for those properties that, as of 1980, had obtained a valid right to water from the United States, with a priority of July 2, 1902.

The second factor in determining whether a valid water right exists for a particular piece of property is whether the right has been, or is in the process of being, timely perfected. "When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." *Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-544 (1869). As the United States did not apply water to land, every farmer who obtained a water right from the United States was required to perfect the water right awarded to the United States by actually applying water to land, beneficially using the water to irrigate crops. As with the question whether a farmer obtained a water right from the United States, a determination of the issue whether each farmer perfected his right would be premature as to many particular pieces of Project property. In addition, determination whether a right had been perfected was not necessary to the resolution of the Decrees. As relevant to those users standing in line behind the farmers, the Decrees established the critical and essential parameters of any water right: the water duty and the priority date for each Project farmer.

The third factor relevant to a determination whether a valid water right exists for specific Project property is whether a perfected right has been abandoned or forfeited. This factor queries whether the farmer, after obtaining a right

to stand in line from the United States, and after perfecting that right by actually standing in line and taking water, has left the line? Again, given the nature of this factor, it could not have been considered in either Decree. Neither Decree could predict which farmers would abandon or forfeit their rights, and when those rights would be abandoned. A valid water right that existed in 1910 or 1920 might cease to exist in 1985, after both Final Decrees had been entered.

While the Orr Ditch and Alpine Decrees could not resolve whether a water right existed for a particular Project property, both Decrees could resolve the parameters of the water rights sought by the United States on behalf of the farmers. Specifically, the United States sought a determination of the water duty and the priority date, the critical parameters of any water right. As noted above, both Decrees resolved these parameters as 3.5 or 4.5 afa of water, with a priority of July 2, 1902.

Treating Project Farmers as Obtaining Water from Source

Another argument that has been articulated is that, in determining a priority date for individual Project water rights and applying the relation back doctrine, the Court should engage in a legal fiction that the Project farmers obtained their water rights from the source, rather than from the United States. The argument fails, however, because it ignores that the source of the water diverted and used by the farmers is the Truckee River. As noted above, the Truckee river was subject to a full stream adjudication initiated by the United States. This adjudication resolved, as of 1940, the water duty and priority date for all existing rights to water, perfected or inchoate, whose source was the Truckee River system. Accordingly, res judicata precludes both the Tribe and the United States from arguing that the farmers should be treated as if they appropriated their water directly from the Truckee River, rather than as a transfer from the United States. As to the priority date for Project water rights, the parties could have argued, during the litigation of the United States' Orr Ditch complaint, that the court should adopt the

unique legal fiction that the Project farmers had appropriated water directly from the Truckee instead of from the United States. As this legal theory was not raised during the stream adjudication determining the priority date of Project water rights, the parties are precluded from raising the argument in this review of transfer applications.

The Court finds that the State Engineer did not err in recognizing that the priority date for all individual Project water rights, as established by the Orr Ditch Final Decree, is July 2, 1902. Accordingly, none of the water rights at issue are subject to forfeiture.

Whether the State Engineer Ignored Clear and Convincing Evidence of Intentional Abandonment.

The Tribe argues that, as to Parcels 1 and 10, the evidence indicated that these parcels contained buildings precluding irrigation for three years. The Tribe suggests the State Engineer erred by ignoring "the obvious **implication**" that the permanent structures evidenced an intent to abandon a portion of the water right on these parcels. The Tribe further argues that the State Engineer should have considered the **combination** of non-use **and** the presence of buildings as meeting the Tribe's burden of showing that the water right had been **abandoned**. As noted in footnote 8 in *Alpine III*, Nevada has not recognized that a prolonged period of non-use raises a rebuttable presumption of abandonment. *Alpine III*, 983 F.2d at 1494. Thus, while evidence of non-use and the presence of buildings may be some evidence of an intent to abandon, such evidence standing alone does not require a finding of abandonment. In his ruling, the State Engineer did not ignore the Tribe's evidence, but clearly found that the Tribe presented evidence both of prolonged non-use and of buildings on the property. In light of this finding, the court cannot agree with the Tribe that the State Engineer did not consider the non-use and presence of buildings, either singly or in combination, in considering whether the Tribe met its burden of showing an intent to abandon.

The State Engineer's ruling is AFFIRMED.

DATED this 11 day of May, 1999.

/s/ Lloyd D. George
Lloyd D. George
United States District Judge

FOOTNOTES TO APP. B

n1 In its moving papers, the United States also raised an issue whether the State Engineer erred by allowing the transfer of the full water duty of 4.5 acre-feet per acre. At oral arguments, however, the United States formally withdrew this issue.

n2 The Court recognizes that stream adjudications are more complex that this simple model, involving other issues such as the place of diversion and the nature and manner of use. However, for present purposes this model is sufficient to serve as a conceptual aid in resolving the issue of the priority of the individual Project water rights.

n3 The award in Claim No. 3 also recognized other beneficial uses to which the diverted water could be applied. None of these other uses, however, is relevant to the present discussion.

APPENDIX C

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF PROTESTED APPLICATION 56226, FILED TO CHANGE THE MANNER AND PLACE OF USE OF THE WATERS OF THE TRUCKEE RIVER HERETOFORE DECREED IN THE ORR DITCH DECREE, STOREY COUNTY, NEVADA.	)	RULING #4116

GENERAL

I.

Application 56226 was filed on April 24, 1991, by the Town of Fernley, to change the manner and place of use of 280.78 acre feet, n1 a portion of the waters heretofore decreed and set forth under Claim No. 3 of the Orr Ditch Decree. n2 The Town of Fernley wishes to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use and to change the place of use to the Fernley Utilities water service area. The point of diversion would remain at Derby Dam, located within the N ½ SW ¼ Section 19, T.20N., R.23E., M.D.B.& M. n3

II.

Application 56226 was timely protested by the U. S. Bureau of Reclamation (Bureau) on the grounds that:

> The granting of this application could have detrimental effects on the operation of the Newlands Project by:
>
> 1. Reducing the amount of water available to project water users.

2. Reducing the conveyance efficiency of the project.

3. Other possible impacts of the proposed change in manner of use and place of use of project water.

The Bureau of Reclamation requests that Application 56226 be denied. n4

III.

Application 56226 was also timely protested by the Pyramid Lake Paiute Tribe of Indians (Tribe) on the grounds that:

1. Pursuant to federal reclamation law, 43 U.S.C. § 389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531, et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; and (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery.

3. Granting or approving the above referenced application by the State Engineer and/or Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested,

and perfected rights and the applicants do not have vested rights to use the waters of the Truckee River on the proposed places of use described in their applications.

4. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

5. On information and belief, said application involves the transfer of an alleged water right that was never perfected in accordance with federal and state law. Such an alleged water right cannot and should not be transferred.

6. On information and belief, said application involves the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said application should be denied because it would increase the consumptive use of water within the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.

8. On information and belief, said application involves the proposed transfer of alleged water rights from land that is not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

9. The application should not be approved because the applicants have not entered into a repayment contract with the United States.

10. The application should not be approved because the proposed use of the Newlands Reclamation Project's water rights is not authorized by federal law.

11. The application should not be approved because the proposed place of use is not within the authorized service area or boundaries of the Newlands Reclamation Project.

12. The application violates the provisions of Nevada law which protect the endangered cui-ui.

13. The application should not be approved because the applicant has not obtained permission of use federal facilities for the transportation of the water it is seeking to obtain and transfer.

14. On information and belief, the water right that is the subject of the application was obtained from a Newlands Project water user who has violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project. The Truckee-Carson Irrigation District also has violated and is continuing to violate those rules and regulations. Approval of the application therefore would violate the Order, Judgement and Decree entered in the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973).

15. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversion of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of

the Operating Criteria and Procedures for the Newlands Reclamation Project; and (iii) it will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE, the protestant requests that the above referenced application be denied and that an order be entered for such relief as the State Engineer deems just and proper. n5

IV.

On January 15, 1993, a Pre-Hearing Conference was held in the matter of protested Application 56226. The Truckee-Carson Irrigation District (TCID) requested and was granted the status of an intervenor. n6

V.

An administrative hearing before the State Engineer was held on May 25, 1993. n7

FINDINGS OF FACT

I.

In addressing change applications, the Orr-Ditch Decree sets forth the procedure to accomplish changes in the point of diversion, manner and place of use.

The Orr Ditch Decree provides at page 88, that: n2

> Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change in the manner provided by law the point of diversion, and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree. n8

The State Engineer finds that change Application 56226 is properly before him for consideration and decision.

II.

The protestant Tribe requested that evidence and testimony presented by the Tribe at the previous hearings on the Newlands Project applications be included in the record on Application 56226. n9 This request was opposed by the Applicant on the grounds that it was not a party to any of the previous hearings. n10 At the hearing, all parties attempted to make this record complete and independent of any previous hearings. The State Engineer finds that this record is complete and that the record of previous hearings will not be included in this record.

III.

The Bureau raised the issue of ownership of the water rights requested to be changed by Application 56226 and contended that the Applicant had failed to establish a claim of ownership of these rights. n11 The Bureau did not present any evidence or testimony that any other party owned these water rights. Later, the Bureau accepted the Town of Fernley's assertion that it had acquired these rights. n12

The Applicant submitted evidence n13 and testimony n14 which shows the Town of Fernley paid the operation and maintenance fees for these water rights that are charged by TCID. The Applicant's testimony revealed that all of the water rights are owned by the Town of Fernley. n15 Additionally, TCID, who keeps the ownership records for the water rights within the Newlands Project, certified to the State Engineer that deeds are on file for these water rights that transfer ownership to the Town of Fernley. n16 The State Engineer finds that the owner of the water rights requested to be changed by Application 56226 is the Town of Fernley.

IV.

The protestant Tribe claims that some of the water rights requested to be changed by Application 56226 have been forfeited. n5 A recent decision of the Ninth Circuit Court of Appeals provides guidance as to whether a water right is subject to forfeiture. n17 The Court stated:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to the date, then it is not subject to possible forfeiture under NRS 533.060. n18

Previously, the State Engineer concluded that the water rights within the Newlands Project, as set forth in the Alpine Decree, n19 "were not subject to Nevada's forfeiture statute because they had vested in the United States upon the creation of the Project in 1902, prior to passage of Nevada's forfeiture statute." n20 On appeal, the Ninth Circuit analyzed whether the water rights in the Newlands Project vested in 1902, and concluded that they did not. n21 Rather, the Court held that, as a matter of law, "the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land." n22 However, the Court did not analyze when the water rights in the Newlands Project were initiated.

The State Engineer must now determine if the appropriations of the water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913. When a right was initiated, that is its priority date, depends upon when the "first step" to appropriate the water was taken and is a matter of Nevada law.

The doctrine of relation back has long applied to water appropriations due to the very nature of the water right and the fact that perfecting the right may take time. The Nevada Supreme Court explained the doctrine of relation back in the following way.

> When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it. n23

According, even though the water was not placed to beneficial use at the time that the first step was taken to secure the water right, so long as the appropriator exercises due diligence, the perfection of the right relates back to the earlier date, the priority date. n24 The state law requirements of "due diligence" and "relation back" apply to reclamation projects. n25

In this case, the individual farmer could not begin to irrigate lands within the Truckee Division of the Newlands Project until the United States obtained water rights for the Project on July 2, 1902, and completed construction on the Truckee Canal and Derby Dam in 1905. n26 In its analysis regarding the vesting of water rights, the Ninth Circuit distinguished between the water rights obtained by the United States for the Newlands Reclamation Project in 1902, and the water rights appurtenant to particular tracts of land. n27 While this distinction proved important as to when the water rights vested, this distinction has no importance as to the priority date of water rights in the Truckee Division of the Newlands Project because of the relation back doctrine. The State Engineer finds that the relation back doctrine applies in this situation and the first step taken in the appropriate of the

water rights in the Truckee Division of the Newlands Project occurred on July 2, 1902.

Additional evidence further bolsters this finding. Beginning in 1905, any person who wanted to initiate a water right in Nevada was required to obtain a permit from the Nevada State Engineer. Act of March 1, 1905, ch. 46, § 3, 1905 Nev. Stat. 67. The water rights that are the subject of Application 56226 were not initiated by an application to the Nevada State Engineer. Instead, all of the water rights requested to be changed under Application 56226 were initiated in accordance with the Reclamation Act, as evidenced by the documents submitted to the United States Department of Interior by the original water right holder. n28 Therefore, the State Engineer finds that the appropriation of the water rights requested to be changed under Application 56226 was initiated in accordance with the law in effect prior to March 22, 1913.

V.

The Applicant assigned reference numbers to each parcel of land comprising the existing place of use of the water rights that are the subject of Application 56226. n29 Each parcel of land is accompanied by a "contract" for a water right from the United States Department of Interior. n28 The contracts for the water rights appurtenant to parcels, 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 were dated prior to March 22, 1913. n30 The contracts for the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19 and 20 were dated after March 22, 1913. n30 The protestant Tribe clams that the water rights whose contracts were dated after March 22, 1913, are subject to forfeiture. n31 No claim of forfeiture is made for those water rights whose contracts were dated prior to March 22, 1913. While not agreeing with this criterion for determining eligibility for forfeiture, the State Engineer finds that the water rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 are not subject to forfeiture.

VI.

Of those parcels of land whose water right contracts were dated after March 22, 1913, three parcels have been irrigated at some time during the years 1984 through 1989. Evidence shows that 75% of parcel numbers 8 and 19 and 100% of parcel 20 were irrigated during this period. n32 The State Engineer finds that a continuous five year period of non-use has not occurred for the water rights appurtenant to parcels 8, 19 and 20.

VII.

Of those parcels of land whose water right contracts were dated after March 22, 1913, the protestant Tribe alleges that parcels 1, 3, 9, 10 and 16 have not been irrigated for a significant period of time. n33 Therefore, the Tribe feels that the water rights appurtenant to parcels 1, 3, 9, 10, and 16 should be declared forfeited. As stated earlier, the State Engineer does not believe that these water rights are eligible for forfeiture. Assuming arguendo that forfeiture applies to these water rights, the following sets forth the standard of proof for forfeiture and analyzes the evidence and testimony supporting the allegations of forfeiture for each of these parcels.

The Nevada Supreme Court has held that there must be clear and convincing evidence that the statutory period of non-use has occurred. n34 The Court required this higher standard of proof because the law disfavors forfeitures. n34

Parcel 1 was described as being "bare land, prepared for cultivation" for the years 1949, 1973, and 1977, based on aerial photographs taken those years. n35 This may be interpreted as cultivated land that happened to be lying fallow with no crop, at those times when the aerial photographs were taken. n36 Parcel 1 was again described as "bare land" in 1984, based on the infrared aerial photographs taken on June 19 and 20, 1984, by the Bureau. The Tribe's witness testified that "the farm unit most likely was in disrepair. It wasn't

organized or prepared for cultivation. . ." n37 However, there is no evidence or testimony showing how that determination was made. The State Engineer has difficulty making a finding of continuous non-use with evidence that the land was prepared for cultivation in 1949, 1973 and 1977. Cultivation is generally associated with irrigation. n34 In addition, there was no evidence of non-use for the years between those years the aerial photographs were taken. The State Engineer finds that the testimony and evidence presented for the years through 1984 do not prove by clear and convincing evidence that a continuous five year period of non-use has occurred.

In support of its allegations of forfeiture, the protestant Tribe refers to a composite map prepared by the Bureau. n32 This map was prepared to show lands with surface water rights as of 1984 that were irrigated one or more years from 1984 through 1989. The interpretation of the composite map concluded that parcel 1 was not irrigated in any of those years. n32 However, there is no evidence or testimony on the record indicating how the Bureau prepared the composite map or how the map was interpreted. Several questions come to mind related to the determination that parcel 1 was not irrigated: 1. Were aerial photographs taken each of the six years and if so, were they interpreted by a qualified person? 2. Was parcel 1 inspected on the ground each year? 3. Were any of the years classified as dry years, in which the irrigator did not receive his full water entitlement? If so, can a water right be forfeited for non-use if the parcel was not delivered water? 4. What is the resolution of the aerial photographs? Some of the parcels of land in Application 56226 are less than 0.2 acre in area. Lacking answers to these questions, the State Engineer finds that the Tribe failed to provide clear and convincing evidence that parcel 1 was not irrigated for the years 1984 through 1989.

In 1991, parcel 1 was described as "bare land, buildings, and roads." n35 The photograph taken in May, 1993, supports this land description and shows no evidence of

irrigation. n38 While there is some question about irrigation of the bare land in 1991 and 1992, there is little doubt that the land on which the buildings stand could not have been irrigated since 1991, when the buildings were first observed. The State Engineer finds that the portion of parcel 1 on which the buildings stand was not irrigated in 1991, 1992, and 1993, which is short of the statutory five years, required for forfeiture.

Parcel 3, in 1949, was described as being "bare land, prepared for cultivation." In 1973, 1984, and 1991, the land was described as "Farm road." n35 However, in 1977, the land was described as being irrigated. n35 This apparent contradiction can be explained if parcel 3 was not located properly in the interpretation of the aerial photographs taken in 1949, 1973, 1984 and 1991. The Applicant's witness, who is familiar with this area, testified that parcel 3 lies adjacent to the farm road, not on the farm road. n39 He also testified that parcel 3 was irrigated in 1984. n40 The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 3.

Parcel 9 was described as having buildings on it in 1977, 1984, and 1991. n35 The photograph taken in 1993, shows the buildings and no sign of irrigation. n38 The existence of these buildings on the property precludes irrigation. The State Engineer finds that a period of non-use, greater than five years, has occurred with respect to parcel 9.

The land use history for parcel 10 is similar to that of parcel 1. "Bare land prepared for cultivation" was observed in 1949, 1973, and 1977. "Bare land" was observed in 1984, and a building was observed in 1991. n34 The photograph taken in 1993, shows homes in what appears to be a subdivision. n38 The State Engineer finds, in the same manner as for parcel 1, that the evidence prior to 1991 is not clear and convincing that irrigation did not take place. The State Engineer further finds that parcel 10 has not been irrigated in 1991, 1992, and 1993,

which represents a period of non-use that is insufficient to declare a forfeiture.

In the years 1973, 1977, 1984 and 1991, a building was observed on parcel 16. n34 The 1993 photograph shows a fairly new building that could not have been constructed as long as twenty years ago. n38 There is no evidence or testimony on the record, whether the building observed in 1973, 1977, 1984 and 1991, is the same as that in the 1993 photograph. The Applicant's witness testified that, as ditch water master for TCID, he personally turned irrigation water onto parcel 16, during the period 1984 through 1989 (later clarified as 1984 through 1986). n41 The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 16.

VIII.

The protestant Tribe asserts that those water rights in Application 56226, whose contracts were dated prior to March 22, 1913, have been abandoned. n5 The Nevada Supreme Court held that abandonment is the voluntary relinquishment of a water right by the owner, with the intention of forsaking and deserting it. n42 The Tribe presented evidence n43 and testimony n44 that some of the lands to which these water rights are appurtenant, have not been irrigated for a significant period of time. The Tribe feels that a prolonged and unexplained non-use creates a rebuttable presumption of an intent to abandon. n45 However, the Ninth Circuit Court of Appeals found that although the longer the period of non-use, the greater the likelihood of abandonment, there was no support for a rebuttable presumption under Nevada law. n46

Permanent improvements, such as farm buildings, roads and canals, have been constructed on some of the parcels. n47 The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights. n45 However, the Tribe presented no evidence or testimony related to the intent to abandon these water rights.

Since the Town of Fernley has owned the water rights at issue here, it has kept the rights in good standing, evidenced by paying the TCID assessments n13,14 and filing appropriate ownership documentation with TCID. n15 The TCID Project Manager testified that the assessments are current. n48 There is no evidence on the record indicating that any previous owner failed to pay the assessments or in any way displayed an intent to abandon or forsake these water rights. The State Engineer finds that there is insufficient evidence and testimony on the record to indicate an intent to abandon these water rights.

IX.

The protestant Tribe alleges that the water right appurtenant to parcel 16 has never been perfected and therefore, under Nevada law cannot be changed. n5,49 The Tribe relied upon aerial photographs taken in 1949, 1973, 1977, 1984, 1990 and 1991, to make this allegation. Mr. Edwin Brush, who was the ditch water master for TCID from 1955 to 1987, testified that he personally turned water from the ditch onto parcel 16. n50 The State Engineer finds that parcel 16 was irrigated and the water right appurtenant to parcel 16 was perfected by putting the water to beneficial use.

X.

The protestant Tribe contends that granting Application 56226 would impair the value of its Truckee River water rights because the Tribe is entitled to all of the unappropriated Truckee River water. n5 The question of the availability of unappropriated water is not at issue. Application 56226 seeks only to change water already appropriated under the Orr Ditch Decree. The State Engineer finds that approval of Application 56226 would not cause the Newlands Project to exceed the quantity of water provided for in the Orr Ditch Decree. The State Engineer further finds that there would be no impairment of any existing rights on the Truckee River as a result of the approval of Application 56226.

XI.

The protestant Tribe feels that approval of Application 56226 would be detrimental to the public welfare in that it would jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout and adversely affect the recreational value of Pyramid Lake. n5 The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species in the lower reaches of the Truckee River and Pyramid Lake. However, Application 56226 seeks only to change the manner of use and place of use of water already appropriated under the Orr Ditch Decree. Therefore, the State Engineer finds that the Newlands water rights set forth under the Orr Ditch Decree would not be exceeded if Application 56226 were approved.

The Ninth Circuit Court of Appeals addressed the Tribe's public interest argument. n51 The Court stated:

> The Tribe's public interest argument cannot be regarded as anything short of an attempted collateral attack on the Orr Ditch decree. "[E]veryone involved in Orr Ditch contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigations was entitled to." Nevada v. United States, 463 U.S. at 143, 103 S.Ct. at 2924. The Engineer found that the proposed transfers would not cause the Project to exceed the overall maximum water consumption provided for in the Orr Ditch and Alpine decrees, and the record supports this finding. Indeed, the Engineer found that these proposed transfers 'cumulatively represent[] a reduction in diversion from the existing places of use which results in less demand on project water."

> By establishing the maximum aggregate amount of water to which the Project was entitled, the Orr Ditch decree necessarily embodies an evaluation of the competing public interests in supplying Project farmers with sufficient water to grow their crops, and Pyramid Lake with sufficient water to benefit indigeneous[sic] fishes. Because the Tribe has asserted no threat to the public interest apart from those considered in the Orr Ditch decree's water rights allocation, the Engineer's conclusion that the transfers do not conflict with the Tribe's water rights satisfies both the public interest aspect and the conflicting rights aspect of section 533.370(3). Moreover, the Engineer's conclusion that the proposed transfers did not threaten to harm the lake's fishes is supported by substantial evidence.

The State Engineer finds that Application 56226 is not unlike those applications considered by the Ninth Circuit Court of Appeals except that, Application 56226 seeks also to change the manner of use to municipal. Therefore, the State Engineer finds that the approval of Application 56226 does not threaten to prove detrimental to the public interest.

XII.

The protestant Tribe feels that these applications cannot be approved because they involve the change "from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands." n5 However, the Tribe does not present any legal basis for this assertion. Nevada water law allows the eligibility for changing the place of use based on the impracticability to irrigate the existing place of use, however, it does not limit changes only to those that meet the eligibility. n52 In addition, the Ninth Circuit Court of Appeals affirmed the fact that the State Engineer is not precluded by statute

from granting a change application where it is not impracticable to use the water at the present site. n53 Therefore, the State Engineer finds that Application 56226 cannot be denied on the basis of the practicability to irrigate the existing place of use.

XIII.

The protestant Bureau feels that the approval of Application 56226 could result in a lower quantity of water flowing to the groundwater basin in the Fernley area. n4 Under present irrigation practices in the Fernley area, the Bureau's witness estimated that each acre of irrigated land returns approximately 1.5 acre feet of the applied 4.5 acre feet, directly to the groundwater aquifer. n54 According to the Bureau's witness, none of this water would recharge the groundwater aquifer if irrigation ceases and the water is used for municipal purposes. n54 The State Engineer finds that the Bureau did not consider the fact that approximately half of the water diverted for municipal use in the Fernley area, flows to the wastewater treatment facility, whose effluent is discharged directly to the groundwater basin via rapid infiltration basins. n55 The State Engineer further finds that the Bureau failed to consider that at a conveyance efficiency of 60%, an additional 3 AF/AC is lost to the groundwater aquifer from transmission losses. The State Engineer finds that the flow of water to the groundwater resource in the Fernley area would not be significantly diminished as a result of changing the manner of use from irrigation to municipal.

XIV.

The protestant Bureau contends that approval of Application 56226 would result in a reduction of the conveyance efficiency of delivery of water within the Newlands Project. n4 The Bureau did not have any quantitative evidence to support this contention but was very concerned about the proposed year-round diversions, especially during the non-irrigation season. n56 However, the Bureau has failed to consider that the Truckee Canal has been

used for over 90 years for year round delivery of water to Lahontan Dam on the Carson River. A check of the stream flow records collected by the United States Geological Survey reflects that the Truckee Canal rarely transports less than 25 cfs. n57 The State Engineer finds that the diversion of water for municipal use as proposed under Application 56226 would not lessen the efficiency of the Truckee-Carson Irrigation District in the delivery of water.

XV.

The Town of Fernley by agreement with TCID, has paid assessments to TCID for all the Newlands Project water rights it acquired, including those rights requested to be changed under Application 56226. n13,14 The State Engineer finds that approval of the Application 56226 will not adversely affect the cost of water for other water users within the district.

XVI.

In many stream systems, a portion of the water diverted for irrigation finds its way back to the stream as return flow. The return flow is then available for diversion by downstream users. When the manner of use is changed from irrigation to municipal, often there is no return flow back to the stream. To account for this lack of return flow, the Alpine Decree n19 allows only the consumptive use portion or 2.99 acre feet per acre to be changed to municipal use.

The Orr Ditch Decree n2 contains no such limitation on the quantity of water allowed in a change of manner of use. However, in many cases, the return flow, in a change to municipal use is the Truckee Meadows, is available to downstream users because the treated wastewater effluent is discharged back into the Truckee River system. The State Engineer has approved changes to municipal use, allowing the entire duty to be changed, because there is no reduction in the quantity of water available to downstream users.

In determining whether the consumptive use portion or the entire duty of 4.5 acre feet per acre may be changed under Application 56226, the State Engineer must evaluate the impact on the downstream flow of water. The first step is to examine the fate of the return flow off of irrigated land described in Application 56226 as the existing place of use. This land was irrigated with water diverted through the Truckee Canal. The return flow from this land did not flow back into the system and was never available to downstream users. n58 Under Application 56226, where the Town of Fernley would divert water for municipal use, the return flow would also not return to the Truckee Canal, but instead, would be discharged to the groundwater via the rapid infiltration basins. n55 The State Engineer finds that the change to municipal use of the entire duty of 4.5 acre feet per acre, presents no adverse impacts on the downstream users.

XVII.

The protestants Bureau and Tribe believe that Application 56226 should be denied because the Town of Fernley has complied with Public Law 101-618, in that the Town has not requested approval from the Secretary of the Department of Interior. n4,5 The State Engineer recognizes the Secretary's authority and responsibility under Public Law 101-618, however, the State Engineer has no authority to enforce the provisions of Public Law 101-618. The State Engineer finds that his approval of Application 56226 in no way releases the Town of Fernley from its responsibility to comply with all applicable federal, state, and local requirements.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter. n59

II.

The State Engineer is prohibited by law from granting a permit under an application to change where: n60

A. The proposed change, if within an irrigation district, adversely affects the cost of water for other holders of water rights in the district;

B. The proposed change lessens the district's efficiency in its delivery or use of water;

C. The proposed change conflicts with existing rights; or

D. The proposed change threatens to prove detrimental to the public interest.

III.

The Orr Ditch Decree sets forth the procedure and authority for applications to change the point of diversion, place and manner of use of decreed waters of the Truckee River.

IV.

The owner of the water rights requested to be changed under Application 56226 is the Town of Fernley.

V.

None of the parties to this action made any clams that the water rights whose contracts were dated before March 22, 1919, are subject to forfeiture. The parcels affected are 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28. While not agreeing with this rationale for the reasons more fully set forth below, the State Engineer concludes that the water rights appurtenant to these parcels are not subject to forfeiture.

VI.

The contracts for the water rights appurtenant to parcels 8, 16, 19 and 20, were dated after March 22, 1913. Based on the evidence and testimony on the record, the State

Engineer concludes that these parcels were irrigated during the alleged period of non-use. Therefore, even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VII.

The evidence and testimony supporting the allegation of forfeiture of water rights appurtenant to parcel numbers 1, 3 and 10 do not meet the "clear and convincing" standard. Therefore, the State Engineer concludes that even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels cannot be declared forfeited.

VIII.

There is clear and convincing evidence on the record indicating that parcel 9 has not been irrigated for a period of time greater than five years. If the forfeiture statute were found to apply to the water right appurtenant to parcel 9, then this water right should be declared forfeited. However, for reasons stated below, the State Engineer concludes that the forfeiture statute does not apply to these water rights.

IX.

The State Engineer concludes that none of the water rights at issue here are subject to forfeiture under NRS 533.060. This includes the water rights whose contracts were dated after March 22, 1913. The water rights requested to be changed by Application 56226 were not initiated by permits issued by the State Engineer, which was required under the Nevada Water Law, in effect after March 22, 1913. Instead, the State Engineer concludes that these water rights were initiated under the Reclamation Act of 1902.

X.

The record in this proceeding contains no evidence that there was ever an intent to abandon any of the water rights requested to be changed under Application 56226. Evidence shows that the operation and maintenance changes have always been paid and are current.

XI.

The State Engineer concludes that the water right appurtenant to parcel 16 was perfected.

XII.

There is no evidence on the record that approval of Application 56226 will impair the value of any other existing rights or threaten to prove detrimental to the public interest.

XIII.

The State Engineer concludes that approval of Application 56226 will not result in a lower quantity of water flowing to the groundwater in the Fernley Area.

XIV.

Since water has historically been transported through the Truckee Canal on a nearly continuous basis for over 90 years, the State Engineer concludes that said diversions by the Town of Fernley would not lessen the efficiency in the delivery of water to other users within TCID.

XV.

The State Engineer concludes that as long as the Town of Fernley pays the appropriate charges, the approval of Application 56226 will not adversely affect the cost of the water for other water users with TCID.

XVI.

The entire duty of 4.5 acre feet per acre may be changed to municipal use under Application 56226 with no impacts on any existing rights.

XVII.

The State Engineer does not have the authority to enforce the requirements of federal law, including Public Law 101-618.

RULING

The protests to the granting of Application 56226 are herewith overruled and Application 56226 is approved in the amount of 280.78 acre feet, subject to existing rights and the payment of statutory fees.

Respectfully submitted,
/s/R. Michael Turnipseed, P.E.
R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 27th day of
May, 1994.

FOOTNOTES TO APP. C

n1 The original quantity of water requested to be changed under Application 56226 was 282.26 acre feet. During the hearing, the Applicant withdrew Parcel No. 6, in the amount of 1.48 acre feet, leaving the amount under Application 56226 to be 280.78 acre feet.

n2 Final Decree in United States v. Orr Water Ditch Co., In Equity, Docket No. A-3 (D. Nev. Sept. 4, 1944).

n3 Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993.

n4 Exhibit No. 25, Public Administrative Hearing before the State Engineer, May 25, 1993.

n5 Exhibit No. 26, Public Administrative Hearing before the State Engineer, May 25, 1993.

n6 Transcript pp. 35-36, Pre-Hearing Conference before the State Engineer, January 15, 1993.

n7 Exhibit No. 1, Public Administrative Hearing before the State Engineer, May 25, 1993.

n8 Recently, the Ninth Circuit Court of Appeals interpreted this controlling provision. The Court concluded that "the manner provided by law" means "[n]ot only state water law substance, therefore, but procedure as well governs Orr Ditch water rights." United States v. Orr Water Ditch Co., 914 F.2nd 1302, 1307-1308 (9th Cir. 1990).

n9 Exhibit No. 8, Public Administrative Hearing before the State Engineer, May 25, 1993.

n10 Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 25, 1993.

n11 Transcript p. 42, Public Administrative Hearing before the State Engineer, May 25, 1993.

n12 Post Hearing Brief filed by the U. S. Bureau of Reclamation, July 29, 1993.

n13 Exhibit No. 24, Public Administrative Hearing before

the State Engineer, May 25, 1993.

n14 Transcript pp. 323-326, Public Administrative Hearing before the State Engineer, May 25, 1993.

n15 Transcript p. 211, Public Administrative Hearing before the State Engineer, May 25, 1993.

n16 Transcript p. 323-325, Public Administrative Hearing before the State Engineer, May 25, 1993.

n17 United States v. Alpine Land & Reservoir Co., 983 F.2d 1487 (9th Cir. 1993.)

n18 United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1496 (9th Cir. 1993.)

n19 Final Decree in United States v. Alpine Land & Reservoir Co., Civil No. D-183 BRT (D. Nev. Oct. 28, 1980).

n20 United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1490 (9th Cir. 1993.)

n21 Id. at 1495-96.

n22 Id. at 1496.

n23 Ophir Mining Co. v. Carpenter, 4 Nev. 534, 543-44 (1869).

n24 United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980; 2 R. Beck, Water and Water Rights § 14.03(d)(1) at 195-97 (1991); Black's Law Dictionary 1158 (5th ed. 1979) (relation back is the "principle that an act done today is considered to have been done at an earlier time").

n25 4 R. Beck, Water and Water Rights § 36.04(b) at 193 n.118 (1991).

n26 Nevada v. United States, 463 U. S. 110, 116 (1983).

n27 United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1495 (9th Cir. 1993.)

n28 Exhibit No. 21, Public Administrative Hearing before the State Engineer, May 25, 1993.

n29 Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993. The Applicant assigned numbers from 1 through 28, and number 13 was intentionally

left blank. Also, the water right appurtenant to parcel 6 was withdrawn at the hearing.

n30 Exhibit No'.s 20-9 and 21, Public Administrative Hearing before the State Engineer, May 25, 1993.

n31 Post Hearing Brief filed by the Pyramid Lake Tribe of Indians, August 16, 1993.

n32 Exhibit No. 20-8, Public Administrative Hearing before the State Engineer, May 25, 1993.

n33 Exhibit No's. 20-6 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

n34 Town of Eureka v. Office of the State Engineer of Nevada, 108 Nev, 826 P.2d 948 (1992).

n35 Exhibit No. 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

n36 Transcript pp. 90-91, Public Administrative Hearing before the State Engineer, May 25, 1993.

n37 Transcript p. 91, Public Administrative Hearing before the State Engineer, May 25, 1993.

n38 Exhibit No. 20-12, Public Administrative Hearing before the State Engineer, May 25, 1993.

n39 Transcript pp. 249-252, Public Administrative Hearing before the State Engineer, May 25, 1993.

n40 Transcript p. 224, Public Administrative Hearing before the State Engineer, May 25, 1993.

n41 Transcript pp. 239-243, 245, Public Administrative Hearing before the State Engineer, May 25, 1993.

n42 In Re Waters of Manse spring and its Tributaries, 60 Nev. 280, 286-290, 108 P.2d 311 (1940).

n43 Exhibit No. 20, Public Administrative Hearing before the State Engineer, May 25, 1993.

n44 Transcript pp. 89-100, Public Administrative Hearing before the State Engineer, May 25, 1993.

n45 Post-hearing brief filed by the Pyramid Lake Paiute Tribe of Indians, August 16, 1993.

n46 United States v. Alpine Land and Reservoir Co., 983 F.2d 1487, 1494 (9th Cir. 1993).

n47 Exhibits 20-5 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

n48 Transcript p. 326, Public Administrative Hearing before the State Engineer, May 25, 1993.

n49 Exhibit No. 20-6, Public Administrative Hearing before the State Engineer, May 25, 1993.

n50 Transcript pp. 239-243, Public Administrative Hearing before the State Engineer, May 25, 1993.

n51 United States v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1224 (9th Cir. 1989).

n52 NRS 533.040.

n53 United States v. Alpine Land & Reservoir Co., 878 F.2d at 1217, 1227. (9th Cir. 1989).

n54 Transcript pp. 159-160, Public Administrative Hearing before the State Engineer, May 25, 1993.

n55 Transcript pp. 273-276, Public Administrative Hearing before the State Engineer, May 25, 1993.

n56 Transcript pp. 189-190, Public Administrative Hearing before the State Engineer, May 25, 1993.

n57 See U.S.G.S. gage, Truckee Canal at Wadsworth Station No. 10351300.

n58 Transcript p. 315, Public Administrative Hearing before the State Engineer, May 25, 1993.

n59 NRS 533.325 and Orr Ditch Decree, p. 88.

n60 NRS 533.370.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner-Appellant,

v.

ORR WATER DITCH COMPANY, et al.,
Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,
Defendants-Appellees.

Town of Fernley; Appeal of State Engineer Ruling No. 4116

---/

No. 99-16812

D.C. No.
CV-N-A-3-LDG

O R D E R

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

ORR WATER DITCH COMPANY, et al.,
Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,
Defendants-Appellees.

Town of Fernley; Appeal of State Engineer Ruling No. 4116

---/

No. 99-16817

D.C. No.
CV-N-A-3-LDG

Before: SCHROEDER, Chief Judge, NOONAN and W. FLETCHER, Circuit Judges.

Chief Judge Schroeder and Judge W. Fletcher have voted to deny the three petitions for rehearing and petitions for rehearing en banc filed by Appellees Truckee Carson Irrigation District, State Engineer, and Town of Fernley, respectively on August 20, August 20, and August 22, 2001. Judge Noonan voted to grant the same petitions for rehearing and recommended granting the same petitions for rehearing en banc.

The full court has been advised of the petitions for en banc rehearing, and no judge of the court has requested a

vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and the petitions for rehearing en banc are DENIED.

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA

The United States of America Plaintiff,	In Equity, Docket No. A3
vs.	FINAL DECREE
Orr Water Ditch Company, et al. Defendants.	

FINAL DECREE

This cause having been heretofore heard by the Court and, following argument by counsel, the matter having been referred to George F. Talbot, as Special Master, and the said Special Master having thereafter rendered his report and made his findings, and the same having been approved and adopted by the Court (except as disallowed or modified by the Court) by a certain order termed "Temporary Restraining Order" made and entered in said cause under date of February 13, 1926:

NOW THEREFORE, in accordance therewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every

other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth and entitled and allowed to divert and use, from the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplying the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed.

TRUCKEE RIVER DIVERSIONS

Government Rights

INDIAN DITCH

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1948 and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount no exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall

not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cubic foot per second per acre for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregated number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2. In addition to water for the above menfioned 3130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and

benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

DERBY DAM AND TRUCKEE CANAL

Claim No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW¼ of Section 19, in T. 20, N., R. 23, E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for the reclamation are naturally dry and arid and without the application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such

control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

LAKE TAHOE STORAGE

Claim No. 4. Under the Reclamation Act and for irrigation and other beneficial uses on lands under said project and lands within the basins of the Truckee, Carson and Humboldt rivers in Washoe, Storey, Lyon, Churchill and Humboldt counties, in the State of Nevada, and pursuant to notice posted, by direction and authority of the Secretary of the Interior and for an on behalf of the United States, on the right bank of the Truckee River at the site of the dam in said river near Tahoe City and in Placer County, California, and about 500 feet downstream from Lake Tahoe, on the 21st day of May, 1903, plaintiff is entitled to, and is allowed with a priority of that date and during all seasons of the year, to have flow into and to hold and store in Lake Tahoe and in a reservoir made of said lake by a dam at said site in said river constructed with the spillway crest thereof six fee above the floors of the flow-ways of said dame as then existing, all waters of or coming into said river or said lake, both surface and under flow, to the extent of 3,000 cubic fee per second and to the extent of the capacity of said lake as a reservoir made by said dam, to said height and subject to the continuous out-flow through said river from said lake or reservoir so made by said lake or dam, of such an amount of water as plaintiff may desire to release or may discharge from said lake or reservoir not exceeding at any time a flow of 3,000 cubic feet of water per second.

In addition to the above specified rights, the United States is entitled to store, discharge and control water in Lake Tahoe as provided in the judgment and decree filed and entered on June 4, 1915, in the case of the United States, plaintiff, versus The Truckee River General Electric Company, a corporation defendant, in the District Court of

the United States in and for the Northern District of California, Second Division, and subject to said decree the United States shall be entitled to discharge from Lake Tahoe an amount of water sufficient to deliver to the head of the Truckee Canal at the Derby Dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allowed at will to release and discharge any of the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other water to which it is entitled, acording to its priority, through the Truckee River to the Derby Dam and there divert the same through the Truckee Canal for irrigation, for storage in the Lahontan Reservoir, for generating power and for other purposes. The rights of said defendant Sierra Pacific Power Company (formerly The Truckee River General Electric Company) under said judgment and decree are hereby recognized and confirmed.

Power Ditches

FARAD PLANT

Claim No. 5. The Sierra Pacific Power Company, a corporation owner, is entitled an dallowed to divert at all times from the Truckee River through the Farad Power Flume, which has its intake on the north bank of the Truckee River in the S½ of Lot 6 in the NW¼ of Section 30, Township 18 North, Range Eighteen East, sufficient water, with a priority of the year 1899, to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver, after transportation loss, to the wheel of said plant, 75 cubic feet of water per second, said plant being situate in the SE¼ of Section 12, Township 18 N. R. 17 E., for the generation of electric power in said plant.

FLEISH PLANT

Claim No. 6. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Fleish Power Ditch and Flume, which has its intake on the east bank of the

Truckee River in the SE¼ of Section 6, Township 18, N. R. 18 E., sufficient water with a priority of February 16, 1904, to deliver, after transportation loss, to the wheel of the Fleish Hydro-Electric power plant, 327 cubic feet of water per second, said plant being situate in the NE¼ of the SE¼ of Section 30, Township 19 N. R. 18 E., for the generation of electric power in said plant.

VERDI PLANT

Claim No. 7. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Verdi Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE¼ of the SE¼ of Section 19, T. 19 N. R. 18 E. sufficient water, with a priority of October 21, 1909, to deliver, after transportation loss, to the wheel of the Verdi Power Plant 399 cubic feet of water per second, said plant being situate in the SE¼ of Section 8 T. 19 N. R. 18 E. for the generation of electric power in said plant.

In addition to such diversion for power purposes, Sierra Pacific Power Company, a corporation, is allowed to divert from said river through the Verdi Power Ditch 220 inches or 5.50 cubic feet of water per second for supplying the Katz Ditch for irrigation to the extent and with the priority hereinafter allowed to this company, for the Katz Ditch under irrigation rights.

In addition to such diversions for power purposes and for so supplying the Katz Ditch with water for irrigation, Sierra Pacific Power Company, a corporation, is entitled and allowed to diver and transport from the Truckee River, through the Verdi Power Ditch and Flume and to deliver to Verdi Lumber from said river through said ditch and flume by, and to receive from the Sierra Pacific Power Company, 100 inches of water with a priority of the year 1894 for supplying and maintaining the log pond of the Verdi Lumber Company in the Town of Verdi, and for logging and saw mill purposes.

WASHOE PLANT

Claim No. 8 The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Washoe Power Ditch and Flume, which has its intake on the south bank of the Truckee River, in the NW¼ of the NE¼ of Section 16, T. 19 N. R. 18 E. sufficient water, with a priority of October 27, 1902, to deliver, after transportation loss, to the wheel of the Washoe Hydro-Electric Power Plant 396 cubic feet of water per second, said plant being situate in the SW¼ of the SW¼ of Section 14, in said township and range, for the generation of electric power in said plant.

Of the water so allowed to be diverted through the Washoe Power Ditch and Flume, Sierra Pacific Power Company is allowed to use during the irrigation season 12.4 inches or .31 cubic feet of water per second, not exceeding a seasonable amount of 50 acre feet for the irrigation of 12.4 acres of its land as hereinafter described and provided under Washoe Power Ditch under irrigation rights.

Also of the amount of water allowed to be diverted through the Washoe Power Ditch, Sierra Pacific Power Company is entitled and allowed to deliver to the defendant Leonidas Frederick Johnson and he is entitled and allowed to have and receive from Sierra Pacific Power Company, 50 inches or 1.25 cubic feet of water per second, to the seasonal amount of 257 acre feet, for the irrigation of his lands as described and as provided hereinafter under Washoe Power Ditch under irrigation rights.

RENO PLANT

Claim No. 9. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Reno Power Ditch and Flume, which has its intake on the south bank of the Truckee River 1365 feet north, 35 degrees west from Quarter Section corner between Section 15 and 16, T. 19 N. R. 19 E. sufficient water with a priority of March 31, 1891, to deliver, after transportation loss, to the wheel of the Reno Hydro-

Electric Power Plant, 250 cubic feet of water per second, and sufficient additional water with a priority of November 1, 1909 to deliver after transportation loss, to the wheel of said plant 46 cubic feet of water per second, said plant being situate in NE¼ of NE¼ Section 15, in said township and range, for the generation of electric power in said plant.

In addition to such allowed diversions for power purposes through the Reno Power Ditch and Flume, Sierra Pacific Power Company is entitled and allowed to divert from the Truckee River and convey through said ditch and flume and deliver to defendants Sarah McClure, James Murray, William Murray and Same Murray and their successors, and they are entitled and allowed to have and receive from said company, 50 inches of water for the irrigation of their lands as hereinafter described and provided under Indian Flat Ditch under irrigation rights.

RIVERSIDE MILL DITCH

Claim No. 10. The Riverside Mill Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Riverside Mill Ditch and Flume, which has its intake on the north bank of the Truckee River at a point 84 feet westerly from the center of Chestnut Street in the City of Reno and in the NW¼ of the SE¼ of Section 11, T. 19, N., R. 19, E., 70 cubic feet of water per second with a priority of May, 1863, for operating the Riverside Flour Mill in the City of Reno and for generating power and for milling purposes.

WADSWORTH POWER PLANT

(Solicitor: James T. Boyd)

Claim No. 13. The Wadsworth Light and Power Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Wadsworth Light and Power Company Ditch, which has its intake on the north bank of the Truckee river in the NW¼ of the SW¼ of Section 13, T. 20, N., R. 23, E., Mount Diablo Base and Meridian, 31.3 cubic feet of water per second with a priority of June 26, 1897, for delivering, after an allowed transportation loss of 20 per cent, 25 cubic feet of water per second to the wheel at the pumping and power plant of this company, situated in the SE¼ of

the SE¼ of Section 33, in T. 21, N., R. 24, E., M.D.M., for the operation thereof and for pumping and for generating electrical and other power.

WADSWORTH WATER SUPPLY

(Solicitor: James T. Boyd)

Claim No. 14. In addition to the amount of water so allowed to be diverted for generating power, for pumping and the operation of its plant, the Wadsworth Light and Power Company is entitled and allowed to divert at all times from the Truckee River through its said power ditch, for supplying the Town of Wadsworth and the people living in or near this town with water for fire protection, for the irrigation of their lawns, gardens and lands, and for household and other purposes, 3.13 cubic feet of water per second with a priority of June 26, 1897, for the deliver, after an allowed transportation loss of 20 per cent, of 2.5 cubic feet of water per second to the reservoir of said company in the SE¼ of the SE¼ of Section 33, in T. 21, N., R. 24, E., M.D.M., and to said people for said purposes. (See Irrigation Rights for irrigation water allowed under this ditch, No. 635.)

WINTER DITCH REGULATION

The owners and operators of ditches through which the diversion of water is allowed for generating electricity and power and for milling, mechanical and municipal purposes, and for supplying the inhabitants of any city or town, whenever ice shall collect in any of their ditches, shall be allowed to divert from the Truckee River and use such additional amount of water as may be required for flushing out such ice and so long only as may be required for such flushing, provided that the water diverted for such flushing shall not in any case be more than 20 per cent of the amount which is fixed and allowed by this decree to be diverted through the ditch in which said flushing is done.

All water diverted or used for generating electricity or power or for operating mills or power plants shall be returned directly to the Truckee River after being so used. Extra water for preventing congestion by ice and for flushing ice allowed to be used in ditches supplying water for municipal purposes when required must be returned directly to the river when used for these purposes.

IRRIGATION RIGHTS

The parties, persons and corporations hereinafter named and their grantors and predecessors in interest have acquired rights of appropriation in, and have diverted and appropriated from the Truckee River and its tributaries and used for the necessary irrigation of their respective hereinafter described lands, water in the respective amounts and under the respective priorities as stated in the following table. As shown by the following tabulations and columns, each of the parties, persons and corporations named in the columns headed, "Owner," directly or by his, her or its grantor or predecessor in interest, on and continuing after the date in the columns headed "Date of Priority" and opposite his, her or its name or described lands, from the stream last named above his, her or its name or in connection therewith, and through the ditch or ditches named in the columns headed "Ditch" and opposite his, her or its name or described lands, for the necessary irrigation of his, her, or its lands as described opposite his, her or its name and in the columns under the words "Acres Irrigated" and following columns, diverted and appropriated water in the amount or amounts stated opposite his, her or its name or described lands and in the columns, headed "Approximate Diversion," and water sufficient to deliver to his, her or its said lands after transportation loss, the amounts in flow and acre feet per season stated opposite his, her or its name or described lands and in the columns under the words "Amount Allowed Delivered to Land":

* * *

Pages 13-85 Omitted

* * *

GENERAL PROVISIONS

In the foregoing table and columns pertaining to irrigation water rights the word, "Direct," means that the acreages specified thereunder are irrigated by water hereby allowed to be diverted from the river, creek or stream last named above the acreage; the word, "Drain," means that the acreages thereunder are irrigated by drain or by drain or waste water hereby allowed and ordered for the irrigation thereof; the word, "Season," means the time in any calendar year when irrigation may be needed; the word, "Priority,"

means the time when the water right was initiated. "Inch" means one-fortieth (1/40th) of one cubic foot per second, which, in general is the amount of water which will flow through an orifice having an area of one square inch, under a pressure of six (6) inches at the center of the opening. "Acre Foot," means the amount of water which will cover an area of one acre to a depth of one foot.

All of the above described ditches, lands and sections are in townships north and ranges east, Mount Diablo Base and Meridian. All of the irrigated lands are in the State of Nevada, except a part of the tracts listed under Dog, O'Neil and Sunrise creeks. All the ditches, canals and flumes are in the State of Nevada excepting the Farad and the upper end of the Fleish. Lake Tahoe is partly in Nevada and partly in California and the outlet of the lake to the Truckee River and the dam controlling the storage in the lake are in the State of California.

Without the application of water thereto the above described lands are dry and arid and irrigation is necessary for the production of valuable drops thereon. The respective amounts of water hereinbefore stated to have been appropriated for or used on these lands, are in each instance as specified therefore necessary and sufficient for the reasonable and economical irrigation of crops thereon other than grain, potatoes, corn and beets. These do not need to be irrigated for so many months as alfalfa and pasture. Only two-thirds of the amount of water in acre feet hereinbefore specified or allowed for the irrigation of any of the above described tracts of land is necessary for, or should be or is allowed for the irrigation of grain grown thereon. Only four-fifths of the amount of water in acre feet designated above for the irrigation of said tracts of land is necessary for, or should be or is allowed for, the irrigation of potatoes, corn or beets grown thereon. Young alfalfa needs frequent irrigations for a long season. An additional amount of ten per cent of the quantity of water hereinbefore specified in acre feet for the irrigation of any of the above described lands is necessary for and should be and is allowed for the irrigation thereof during

the first year that alfalfa is sown thereon, whether the alfalfa be sown with or without grain.

The amounts of water which the parties to this action have appropriated and used for purposes other than the irrigation as stated above are necessary and sufficient for the uses for which they have been appropriated.

The above named parties who so appropriated water for irrigation have also used and in addition thereto are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes; provided that the priority in respect of the use of water for livestock and domestic purposes of any person shall be identical with the priority of such party for irrigation.

IT IS FURTHER ORDERED AND DECREED that that certain agreement known as the Truckee River Agreement, dated July 1, 1935, entered into by the United States of America, party of the first part, Truckee-Carson Irrigation District, party of the second part, Washoe County Water Conservation District, party of the third part, Sierra Pacific Power Company, party of the fourth part, and such other users of the waters of the Truckee River as may have or shall become parties to said agreement by signing their names thereto, parties of the fifth part, which agreement provides (among other things) for the upstream storage of the waters of the Truckee River and its tributaries, be and for the same is hereby approved, adopted by the Court and made a part of the decree and shall be binding as between the signatory parties to said agreement.

Water for irrigation is allowed to be used at any time, provided that the amount applied to the land during any calendar year shall not exceed the quantity in acre feet allowed to the land.

No owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of

the quantity of direct water in acre feet hereby allowed for the land for the season.

If it shall appear at any time in regard to the actual use and need of water for irrigation that the amount hereinbefore estimated and allowed to be diverted from the river or stream into any ditch or canal is not sufficient after transportation loss to deliver to the land the flow allowed by this decree for application to the land, the allowance or flow as fixed by this decree for application to the land shall control, and there may, and hereby is allowed to be diverted from the stream a larger amount than the amount hereinbefore estimated for diversion from the stream, to the extent necessary to supply to the land, after actual transportation loss, the flow of water allowed by this decree for application to the land. Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed by this decree for application to the land and only the quantity needed for the irrigation thereof.

When any other user will thereby be deprived of any part of the water to which he is entitled, no ditch owe r or user shall be allowed to divert away from the stream extra water for regulating the flow in any ditch.

The parties, person, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree, and each and all of said parties, persons, corporations, intervenors, agents, attorneys, servants, assigns and

successors in interest; and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Truckee River or its tributaries or with waters of any of the creeks or streams, or with any of the other waters hereinabove mentioned, so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree, having due regard to the relative priorities herein set forth; and each of the said parties and persons and each of their agents, servants, attorneys and employees is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree, as herein set forth, until such persons or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them.

Except as herein specially provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water hereinbefore allowed are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.

In any case where water is obtained from two or more sources, the aggregate amount of the combined waters from such sources which may be used, shall not exceed the amount required for such use as herein determined.

Whenever in this decree words of ownership are used in connection with any irrigated lands, such words shall not adjudicate, determine or affect any property rights therein, and this decree does not and shall not in any way determine the title to or rights in any property whatsoever other than

the rights to the diversion and use of water as herein determined and established. In the cases where, this decree, water is allowed to be diverted through any ditch by the owner thereof for another party the conditions of any contractual relations existing between them are not hereby determined.

A Water Master shall be appointed by this Court to carry out and enforce the provisions of this decree and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Master, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch or canal owners or water users so disobeying or disregarding such proper orders, rules or directions, and the Water Master shall promptly report to the Court his said action in such case and the circumstances connected therewith and leading thereto. Whenever the necessities of the situation appear to the Court to so require, the Court shall authorize the employment by the Water Master of such person or persons to assist the Water Master as the Court may deem necessary to properly carry out the provisions of this decree and the orders of the Court. The terms of employment, expenses and compensation of said Water Master and his assistants, the payment thereof and means and methods of securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make. The compensation and expenses of the Water Master and his assistants shall be borne by the parties whose rights are adjudicated by this decree in the following manner, to-wit: One-third by the United States, one-third by the Sierra Pacific Power Company, and the remaining one-third by the remaining persons or corporations whose rights are adjudicated by this decree. Any person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises.

The owner or owners of each ditch or canal herein authorized to divert water from the Truckee River or any of its tributaries, or from any ditch or canal or other waterway receiving water therefrom, shall, within sixty (60) days after the entry of this decree, or such lesser time as may be fixed by the Water Master, install and thereafter at all times properly maintain in such ditch, canal and other waterway, a reliable, sufficient and easily-operated regulating headgate and locking and measuring devices, to be approved by the Water Master, whereby the water diverted into such ditch, canal or other waterway at any and all times may be properly regulated and correctly measured.

The stored water of any reservoir, including Lake Tahoe, may be turned into and carried in the channel of any natural stream and mingled with the waters thereof and diverted therefrom for the proper uses of the persons or parties entitled thereto. The Water Master, upon timely notice, shall so regulate the headgates along the streams and do and direct to be done such other things as may be needful to transport such stored water and deliver the same to the person or persons entitled thereto. All persons are hereby prohibited from in any way interfering with any such stored water while the same is being legally carried to the persons or parties entitled thereto.

The quantities of water permissible to be diverted by the owners of the several ditches, through said ditches, on account of the several priorities herein decreed, are decreed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required under a reasonable, economical and beneficial use. Rotation, or the combining and exchanging of the use of water between ditches and among users shall be permitted when necessary in order to obtain reasonable economy in the use of water of the river or other streams, or in order to give to each ditch or user a more advantageous irrigation head, provided that such rotations shall not injuriously affect any of the rights determined and allowed by this decree. The Water Master may arrange for such

rotations and consult with and endeavor to obtain the agreements of the various water users thereto, as the occasion may require and shall promptly report to this Court his action in the premises.

All users of water allowed by this decree a flow of less than one inch per acre for his, her or their respective lands may, with the consent of the Water Master or by his direction to the owners or person in charge of the ditch through which the water is conveyed, use when needed for the irrigation of his, her or their land, a larger flow than specifically allowed by this decree, up to and not exceeding one inch per acre, provided the amount of water used during any calendar year shall not exceed the seasonal acre feet allowance for the land, and that the flow allowed would not, if continuous, deliver in any one month in excess of twenty-five (25) per cent of the seasonal allowance in acre feet heretofore in this decree specifically allowed for said lands.

Whenever any person or party shall not be receiving the amount of water to which he is entitled under the Decree, the Water Master shall, upon request open, close, lock and regulate the necessary headgates, ditches and other works used for the diversion and application of such waters as to apportion the same as herein provided, and for that purpose may enter upon the lands of any and all persons having rights to adjudicated by this Decree.

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or- purpose or use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.

The State of Nevada is not a party to this suit but the rights of the State to water through different ditches which divert from the Truckee River for the State and numerous parties to this action have been estimated for convenience and purposes of administration.

The several parties to this suit shall pay and bear their own costs.

Said Sierra Pacific Power Company is the identical party and corporation referred to herein and in the "Temporary Restraining Order" made and entered in said cause on February 13, 1926, as the "Truckee River General Electric Company, a corporation", the name of said corporation having been heretofore changed, pursuant to law, from the Truckee River General Electric Company to Sierra Pacific Power Company.

The foregoing adjudications set forth in Claims Numbers 1 to 744, inclusive, of this Decree are based upon conditions existing at or prior to the entry of said Temporary Restraining Order herein on February 13, 1926; and such adjudication shall not be deemed to limit, reestablish, or otherwise affect any rights acquired, created or lost subsequently thereto by conveyance, transfer, abandonment, non-user, contract (including said Truckee River Agreement) or otherwise, but the rights of the United States shall be as herein adjudicated as of the date of this decree save only as the same may be affected by said Truckee River Agreement.

Done in open court this 8th day of September, 1944.

Frank H. Norcross,
District Judge.

APPENDIX F

Doctrine of Relation

Nature and importance.—The doctrine of relation, or relation back, is important in the appropriation water rights jurisprudence of the West. Its importance lies in its bearing on the priority of an appropriation—its function of holding the claimant's priority intact pending his completion of the appropriative process with due diligence, at which time his priority relates back to the time at which acquisition of the right was initiated.

The doctrine was recognized by the Supreme Court of California in one of its very early cases, decided within a few years after gold was discovered. The first water rights case in which the doctrine was expounded appears to have been *Kelly v. Natoma Water Company*, decided in 1856. Reference was made to *Stark v. Barnes*, an 1853 decision (not a water case) wherein a correct statement of the doctrine was said to be that "'where a number of acts are to be performed, in virtue of which a right accrues, the time of performance of the last act, when all have been performed in good faith, relates back to the commencement of the series of acts which create the right, so as to make it perfect when the first act was being commenced.'"

In the *Kelly* case the supreme court stated that in the *Stark* case "the doctrine of relation, as between the acts of the plaintiff, first and last, was simply applied to the thing possessed, and not to the intention of possessing." The actual holding in the *Kelly* case is that the right does not relate back to the intention to appropriate water. The *dictum* in the case is that it does relate back to the first act of possession in the series of acts constituting the appropriation.

In absence of statute.—The doctrine of relation as applied to acquisition of appropriate rights was recognized throughout the West. It was the subject of many court pronouncements.

(1) Statement of the doctrine. In many court opinions, the doctrine of relation back has been expressed in various ways. The doctrine embodies the features that (a) if a party embarks in good faith upon a project to appropriate water, (b) if he consummates his purpose without unnecessary delay by exercising reasonable diligence in every step required in constructing facilities, diverting water, and completing the appropriation, (c) then although his power of enjoyment will not commence until completion is accomplished, yet his right as against those who initiate their appropriations after he does will have relation back to the time of commencement. As discussed earlier, the act of completion from which the priority of the right relates back to the beginning may be (a) completion of construction of works, or (b) application of water to beneficial use, depending upon the era and the statutes and court decisions in point. Under the current statutes regulating the appropriations of water under permit from the State Engineer, completion of appropriation invariably refers to actual application of the water to beneficial use.

> Therefore, as between two persons digging ditches at the same time, and prosecuting work thereon, with reasonable diligence, to completion, the one who first began work had the prior right, even though the other had completed his first. This was the doctrine of "relation back."

While, then, in the absence of a statute requiring notice, or other action, the right relates back to the time when the first step was taken, "it does not apply, or protect the intending appropriator however, unless he prosecutes his work of diversion with reasonable diligence." In such case, the priority "generally dates from the time when the work is completed or the appropriation is fully perfected." This would usually be "the time of actual application of the water" to the intended beneficial use. Until this is done, the claimant's rights are inchoate.

Relation back is not to be confused with the perfecting of title to the water right. The title is perfected when the appropriation is complete, whether or not

diligence was exercised. When completion of the appropriation occurs, then the priority dates back, by operation of the doctrine of relation to the beginning of the work, *provided* that the invariable prerequisites have been fulfilled.

(2) Reason for the doctrine. In a very early case, the California Supreme Court observed that the right of relation back was necessary for the protection of prior appropriators. If the right were not to commence until completion of the canal, the value of a large water right could be destroyed by a small appropriation made after nearly the entire work on the prior appropriation had been completed.

In a stream adjudication decision rendered nearly three-quarters of a century later, the Oregon Supreme Court expressed much the same thought. Diligence and relation back must be considered together, said the court, because the rule with its basis on diligence grew out of necessity through conflicting claims of settlers in the arid districts. "Except for its application the doctrine of appropriation would have resolved itself into a scrambling rush for the possession of the water right, and the question would always be decided in favor of the one who either had the most money or the one who had the least to do to effect a diversion of water."

(3) Initiation of the claim. The date to which the completed right related back was variously referred to as initiation of the claim commencement of the appropriation, or first step in appropriating water.

In the absence of a well-recognized custom (as well as absence of statute), the first act must have been such as to indicate the intention of appropriating the water in such manner as to put a prudent man upon inquiry. This may have been the giving of notice of intention to appropriate water; or the beginning of construction of a diversion dam or ditch or other appliance by means of which the appropriation is effected; or the commencement of surveys for the canal route.

Trivial labor and small expenditures will not carry the appropriation back by relation to the "first substantial

act of the appropriator for its acquisition." There must be an open, notorious, physical demonstration, conclusively indicating a fixed purpose of pursuing and, within a reasonable time, acquiring a water right.

In an interstate case, the United States Supreme Court expressed its view that under the doctrine of appropriation as applied in the States that were parties to the controversy, in the absence of statute, the right when perfected by use is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work on the project is begun—provided the work is carried to completion and the water is applied to beneficial use with reasonable diligence.

(4) Local custom. Before enactment of the legislative acts authorizing acquisition of appropriative rights which were initiated by posting and filing notice of appropriation, local customs to that effect had developed in many areas of the West. In California, this custom was adopted in the gold mining regions from similar mining practices.

> [In Oregon, before the legislative enactment of 1891,] it was a recognized rule that the appropriation of water of a stream, initiated by the posting and recording of a notice of appropriation, in accordance with a custom, and perfected by diversion and application of the water to a beneficial use within a reasonable time, dates back under the doctrine of relation to the first step taken. * * * Such a rule may be said to have become established, under varying circumstances and conditions, in this state.

In one of its earliest water rights decision, the Montana Supreme Court held that notices of appropriation posted on a stream, and immediate entering on the work of constructing dam and ditch, were sufficient to put other parties on their guard and to apprise them of the initiated appropriation.

(All footnotes omitted.)

APPENDIX G

Doctrine of Relation.

The principle of "relation back" was established early in the judicial history of water rights in Nevada.

If the work of constructing facilities, diverting, and using water is prosecuted with reasonable diligence, the date of priority of the right relates back to the time when the first step was taken to obtain the right. n95 If, however, the work is not prosecuted with reasonable diligence, then the priority of the right does not relate back, but generally dates from the time when the work is completed or the appropriation fully perfected.

Nonstatutory appropriation. - Prior to the enactment of any statute prescribing a method of initiating an appropriative right, the first step in appropriating water ordinarily would be the beginning of the dam or ditch or flume, as the case may be, by means of which the appropriation would be effected, and that would be the date of initiating the appropriation for the purposes of the doctrine of relation. n96

Extant statutory appropriation. - In appropriating water under the extant statutory procedure, the first step taken in making the appropriation, which means the first step in the inception of the appropriative right, is filing of the application in the office of the State Engineer. n97

The general appropriation statute does not state in so many words that the date of filing the application shall constitute the date of priority of an appropriation made in strict compliance with the statutory procedure, but it seems to be clearly implied. The State Engineer is required to endorse on each application the date of its receipt and to keep a record of the same; and if the application is returned for correction and is refilled in proper form within a period of time prescribed by the statute, the application does not "lose its

priority of filing on account of such defects." Furthermore, the ground-water statute of 1939 states explicitly that the date of filing an application to appropriate ground water is the date of filing the application in proper form pursuant to the general water law, and there is no apparent reason to conclude that the legislature intended to discriminate in this matter. n98

FOOTNOTES TO APP. G

n95 *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 543-544 (1860).

n96 *Irwin v. Strait*, 18 Nev. 436, 437 4 Pac. 1215 (1884); *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73, 109 (D. Nev. 1897). See also *Rodgers v. Pitt*, 129 Fed. 932, 941 (D. Nev. 1904).

n97 Nev. Comp. Laws 1929, secs. 7944 and 7945.

n98 Nev. Comp. Laws 1929, Supp. 1943-1949, sec. 7993.18, provides in part: "The date of priority of all appropriations of water from an underground source, mentioned in this section, is the date when application is made in proper form and filed in the office of the state engineer pursuant to the general water laws of this state."

Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

Nos. 01-1224 and 01-1226

In the Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

STATE OF NEVADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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22 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that, in determining whether water rights held by individual water users in the Newlands Reclamation Project in Nevada are exempted from forfeiture pursuant to Section 533.085 of Nevada Revised Statutes Annotated, the date on which the appropriation was initiated is the date on which the individual landowner took the first steps to appropriate project water appurtenant to his land.

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In the Supreme Court of the United States

No. 01-1224

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 01-1226

STATE OF NEVADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26)[1] is reported at 256 F.3d 935. The opinion of the district court (Pet. App. B1-B21) is not reported.

[1] The citations to "Pet. App." refer to the petition for a writ of certiorari filed by the State of Nevada, No. 01-1226.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2001. Petitions for rehearing were denied on November 8, 2001 (Pet. App. D2-D3). The petitions for a writ of certiorari were filed on February 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States and the Pyramid Lake Paiute Tribe challenged the Town of Fernley's application to the Nevada State Engineer for a change in the manner and place of use of approximately 280 acre-feet of water from the Newlands Reclamation Project. The district court rejected the United States' and the Tribes' contentions that the water rights had been forfeited or abandoned under Nevada law. Pet. App. B1-B21. The court of appeals reversed and remanded for further proceedings. *Id.* at A1-A26.

1. Nevada enacted its first comprehensive water code in 1913. That statute contained a provision for forfeiture of water rights, stating that any water right not used during a period of five successive years was forfeited:

> [I]f the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtentant thereto theretofore acquired * * *.

Nev. Rev. Stat. Ann. § 533.060(2) (Michie 1995). The statute also contained a savings clause, exempting certain water rights from forfeiture:

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Id. § 533.085(1). Those laws apply to the water rights at issue in this case.[2]

2. The Department of the Interior's Bureau of Reclamation administers the Newlands Reclamation Project, which diverts water from the Truckee and Carson Rivers in Nevada to provide water for irrigation. Pet. App. A6. Since 1926, except for a period of time during the 1970s and 1980s, the Truckee-Carson Irrigation District (TCID) has operated the Newlands Project through contractual arrangements with the Department of the Interior. Beneficial rights to the use of Project water are held by individual landowners pursuant to contracts with the Department of the Interior. *Ibid.*

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[2] In 1999, the Nevada legislature amended Section 533.060(2) of the Nevada Revised Statutes Annotated to exempt all surface water rights in Nevada from statutory forfeiture. See Act of June 9, 1999, ch. 515, §§ 1, 3, 1999 Nevada Stat. 2630, 2631 (A.B. No. 380) (adding a new section to, and amending, Section 533.060(3)). Section 7 (1999 Nev. Stat. 2634) however, states that the provisions of the Act addressing forfeiture and abandonment of Nevada water rights do not apply to water rights that were challenged in any legal or administrative proceeding as of April 1, 1999, which includes the water rights in this case.

The Newlands Project diverts water from the Truckee River into the Truckee Canal, which joins the Carson River at Lahontan Reservoir. Pet. App. A6. Water from the Truckee Canal is used to irrigate nearby lands in the "Truckee Division" of the Project. The combined waters of the Truckee Canal and the Carson River in Lahontan Reservoir provide water to irrigate lands in the "Carson Division" of the Project. *Ibid.*

Water rights in the Truckee Division of the Project are governed by the *Orr Ditch* decree, which awarded the United States the right to divert a specified amount of water from the Truckee River with a priority date of July 2, 1902. See *United States* v. *Orr Water Ditch Co.*, In Equity, Docket No. A3 (D. Nev. Sept. 4, 1944) (reprinted in part at Pet. App. E1-E19). Water rights in the Carson Division are governed by the *Alpine* decree, which awarded the United States the right to divert and store the entire flow of the Carson River as it reaches Lahontan Dam, also with a priority date of July 2, 1902. See *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), aff'd, 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983).

The Truckee River terminates in, and is the main source of water for, Pyramid Lake. That lake, which is "widely considered the most beautiful desert lake in North America," *Nevada* v. *United States*, 463 U.S. 110, 114 (1983), is the central feature of the Pyramid Lake Paiute Tribe's reservation and habitat for two species of fish listed under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* Pet. App. 6-7. The Newlands Project's diversions of water from the Truckee River have adversely affected the size and ecology of the lake and are largely responsible for the threats to the lake's fish. *Id.* at 7. The United States is required by court

order and by statute to ensure that water diversions from the Truckee River are limited to those waters necessary to serve valid water rights of Project water users. See Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, §§ 202, 209, 104 Stat. 3294, 3317; *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973).

3. The Town of Fernley filed an application with the Nevada State Engineer to change the manner and place of use of 26 Project water rights it had acquired for use of water from the Newlands Project. Those water rights encompassed a total of roughly 280 acre-feet of Project water. Pet. App. A6. The United States and the Tribe filed protests to the application on several grounds, including an objection that the water rights proposed for transfer had been forfeited or abandoned under state law and therefore could not be transferred. *Id.* at A7. Those protests are subject to a series of federal court rulings that govern challenges to transfer applications. See *id.* at A9.

The legal disputes culminating in the 1980 *Alpine* decree established that applications for transfers of Newlands Project water rights are to be directed to the State Engineer, who has primary administrative jurisdiction under Nevada law to review such applications. See *United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851, 857-858 (9th Cir.), cert. denied, 464 U.S. 863 (1983) (*Alpine I*); see also Nev. Rev. Stat. Ann. §§ 533.345, 533.370 (Michie 1995). The decision further states that appeals from the State Engineer's determinations are to be taken to the United States District Court for the District of Nevada, which expressly retained jurisdiction to supervise and enforce its decree. *Alpine I*, 697 F.2d at 857-858.

After the *Alpine* decree became final, many farmers who used Project water filed applications to transfer water rights from an existing location to other locations within the Project area. The Tribe challenged certain transfers on various grounds, including the ground that the water rights proposed for transfer had been forfeited or abandoned and therefore were not valid rights available for transfer. *United States* v. *Alpine Land & Reservoir Co.*, 878 F.2d 1217 (9th Cir. 1989) (*Alpine II*). The district court held that Nevada law was inapplicable to the validity of the transfer applications, but the court of appeals disagreed, reversing the district court's decision and remanding the case for further proceedings. *Ibid.*; see also Pet. App. A9.

Following that remand, the State Engineer ruled that, for the purposes of applying the state forfeiture statute, the water rights of all individual users in the Newlands Project vested on July 2, 1902, the priority date assigned by the *Orr Ditch* and *Alpine* decrees to the Newlands Project water rights as decreed to the United States. Because the forfeiture statute did not apply to water rights vesting prior to March 22, 1913, the Engineer concluded that the water rights of individual users of Newlands Project water were not subject to forfeiture. The district court affirmed the State Engineer's determinations respecting forfeiture, but the court of appeals reversed the district court's decision. *United States* v. *Alpine Land & Reservoir Co.*, 965 F.2d 731 (1992), as amended, 983 F.2d 1487 (9th Cir. 1993) (*Alpine III*); see Pet. App. A9-A10. The court of appeals held that the applicability of the state forfeiture statute was determined not by the United States' 1902 priority date for the Project as a whole, but rather by the date on which each individual water user initiated the appropriation of water from the Project

and took the first steps to put the water to beneficial use on a particular farm parcel. 983 F.2d 1495-1496.

The court of appeals reasoned that, according to the Nevada Supreme Court, the Nevada legislature's purpose in exempting pre-1913 rights from impairment by the new water law regime was "'to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act.'" *Alpine III*, 983 F.2d at 1496 (quoting *In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940)). The court of appeals accordingly determined that, because the purpose of Section 533.085(1) of Nevada Revised Statutes Annotated was to insulate from forfeiture those water rights where "appropriations have been initiated" (Nev. Rev. Stat. Ann. § 533.085(1) (Michie 1995)), "it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land." 983 F.2d at 1496; see Pet. App. A12-A13. The court held that "[i]f the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060." 983 F.2d at 1496; see Pet. App. A14.

4. Notwithstanding the United States' and the Tribe's protests, the Nevada State Engineer approved Fernley's application to change the manner and place of use of the water rights in this case. Pet. App. C1. The State Engineer determined, among other things, that the water rights in Fernley's transfer application were not subject to forfeiture under Nevada's forfeiture statute because the appropriation of those rights was initiated prior to March 22, 1913. *Id.* at A8, C9. The State Engineer was of the view that *Alpine*

III addressed only the question of when Newlands Project water rights vested in the individual users and not when appropriations were initiated. He concluded that appropriation of the rights was initiated on July 2, 1902, the priority date confirmed to the Project water rights as a whole.

To reach that conclusion, the State Engineer applied the State's "relation back" doctrine, under which a water right's priority date is determined by the time when the first step was taken to secure it. Pet. App. C7-C8. The Engineer concluded that the first step was taken to secure the rights for all Newlands Project water users when the United States obtained water rights for the Project as a whole in 1902. *Ibid.* Despite his conclusion that none of the rights were subject to forfeiture, the State Engineer nevertheless conducted a factual analysis to determine whether, if the court were to determine that the rights were initiated on the date the users took their first steps to obtain water from the Project, any of the rights would be forfeited. The Engineer found that forfeiture had been proven with respect to only one of the water rights proposed for transfer. See *id.* at C10-C13; see also *id.* at A19.

The State Engineer also made factual determinations as to whether any of the water rights had been abandoned. Water rights that were initiated prior to March 22, 1913, are not subject to forfeiture but are subject to abandonment. The Engineer found that the record contained no evidence of intent to abandon any of the water rights. Pet. App. C13-C14.

5. The district court affirmed the ruling of the Nevada State Engineer. Pet. App. B1-B21. On the question of forfeiture, the district court affirmed the State Engineer's ruling that all of the water rights were exempt from forfeiture under Section 533.085 of

Nevada Revised Statutes Annotated. The district court did not address the State Engineer's analysis or *Alpine III*. Instead, the district court determined that the *Orr Ditch* decree awarded a July 2, 1902, priority date for all individual water rights within the Newlands Project governed by the decree and that, for the purposes of Section 533.085 of the Nevada Revised Statutes Annotated, appropriation of the water rights of individual users of Newlands Project water was initiated on that date. *Id.* at B5-B20. The district court did not address the State Engineer's factual determinations as to whether the water rights had been forfeited, see *id.* at A19, but affirmed the State Engineer's ruling that none of the water rights at issue had been abandoned, *id.* at B20.

6. The court of appeals reversed the district court's judgment. Pet. App. A1-A26. On the issue of forfeiture, the court of appeals concluded that the question of how to interpret the forfeiture exemption had been previously decided in *Alpine III*. The court of appeals rejected the State Engineer's argument that the forfeiture ruling in *Alpine III* pertained only to when Project water rights were vested in the individual users and not to when appropriation of those rights was initiated. *Id.* at A14-A16. The court reiterated its reasoning in *Alpine III*: The purpose of the forfeiture exemption was to alleviate concerns about unfairness and unconstitutionality and that, given that purpose, the term "initiated" should not be read to refer to the date on which the United States obtained a water right for the entire Project, regardless of when individual farmers actually obtained the right to irrigate their lands. *Id.* at A13. The court of appeals further held that "the district court made the same error when, in affirming the Engineer, it concluded that because each

individual Project water right had a 'priority date' of July 2, 1902, it was therefore initiated, within the meaning of § 533.085, on that same date." *Id.* at A14.[3]

The court did not review the State Engineer's factual findings on forfeiture because the district court had not ruled on them and the underlying factual evidence before the Engineer was not in the record. The court of appeals instead remanded the case to the district court to review those findings, noting that it appeared that the Engineer had imposed a burden of proof stricter than the applicable "clear and convincing evidence" standard. Pet. App. A19-A20. The court of appeals also reversed the district court in part with respect to abandonment and similarly remanded for review of the relevant factual determinations by the State Engineer. *Id.* at A16-A18, A20-A22. Judge Noonan dissented from the court of appeals' forfeiture ruling. *Id.* at A22-A24.[4]

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not conflict with any decision of this Court, any other court of appeals, or any state court of

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[3] The court of appeals noted that the State Engineer and TCID had filed a petition for rehearing and rehearing en banc in *Alpine III*, arguing that the decision failed to recognize the distinction between when a water right "vested" and when appropriation was "initiated." The court found further support for its understanding that *Alpine III* governed both questions in the fact that the *Alpine III* court subsequently amended the opinion specifically to refer both to when water rights were vested and when their appropriation was initiated. Pet. App. A17-A18.

[4] The court of appeals has since applied and followed its forfeiture ruling in this case in deciding another appeal involving related issues. See *United States* v. *Alpine Land & Reservoir Co.*, 279 F.3d 1189, 1199 (9th Cir. 2002) (*Alpine V*).

last resort. The decision simply resolves a narrow question of state law pertinent to a particular water right dispute and remands the case to the district court for application of that law in light of the relevant facts. Review of that decision is accordingly unwarranted.

1. As a threshold matter, review is unwarranted because of the interlocutory posture of the case. The court of appeals identified the appropriate legal standard for determining whether the water rights of individual users of Newlands Project water are subject to forfeiture, but it did not apply those legal standards to the facts of this case. The court of appeals correctly discerned that the district court has not yet reviewed the State Engineer's factual findings respecting forfeiture, and the court of appeals properly chose to remand the case to the district court to review those factual determinations as well as his factual determinations respecting abandonment. The outcome of that review will directly affect the determination of the United States' and the Tribe's challenges to the water rights transfers ultimately at issue. Any challenge that petitioners may have to the court of appeals' interlocutory decision accordingly is not yet ripe for this Court's review. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"); see also *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see generally Robert Stern et al., *Supreme Court Practice* 195-198 (7th ed. 1993).

2. Petitioners contend that the court of appeals was wrong in its construction of state law. Nevada Pet. 8-16, 25-27; TCID Pet. 11-17. This Court, however, ordinarily "accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). See *Supreme Court Practice*, *supra*, at 183 ("The Court uniformly declines review whenever the court of appeals has reached a reasonable and permissible result."). This case provides no occasion for the Court to deviate from its normal practice.

Petitioners suggest that review is appropriate based on this Court's action in *Leavitt* v. *Jane L.*, 518 U.S. 137 (1996) (per curiam). See Nevada Pet. 9. That exceptional case, however, posed clearly distinguishable circumstances. In *Leavitt*, this Court examined a federal court of appeals' construction of a state abortion law because that court's "extraordinary" ruling was "plainly wrong," resulted in "the total invalidation of a state-wide law," and amounted to "blatant federal-court nullification of state law." 518 U.S. at 144-145. The Court recognized that it had not previously granted certiorari solely to review a state law issue since *Steele* v. *General Mills, Inc.*, 329 U.S. 433 (1947), which involved "a federal court's equivalently clear misinterpretation of a state law of equivalent significance." 518 U.S. at 144 n.5; see *id.* at 147 (Stevens, J., dissenting).[5]

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[5] The other cases that Nevada cites (Pet. 9 n.6) do not support its request for certiorari solely to obtain review of a state law question. In *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Court made the unexceptional observation that "we surely have the authority to differ with the lower federal courts as to the meaning of a state statute." *Id.* at 500. In the other cases, the Court merely affirmed federal court rulings on state law in the

The court of appeals' ruling in the instant case does not involve an extraordinary ruling on a controversial matter of constitutional magnitude or invalidate a state-wide law. To the contrary, the panel decision affects a very narrow range of water rights under a federal court decree. By its terms, the decision applies only to determining whether the water rights of individual users of Newlands Project water are subject to forfeiture, and not whether the rights have actually been forfeited. The decision is further narrowed by recent amendments to Nevada's forfeiture statute. See note 2, *supra*. On June 9, 1999, the Nevada legislature amended the statute to exempt surface water rights in Nevada from statutory forfeiture and excluded from that exception only water rights that were under administrative or legal challenge as of April 1, 1999. See § 7, 1999 Nev. Stat. 2634, cited at Pet. App. A7. Thus, the effect of the court of appeals' ruling on water rights other than those involved in this case is limited. Even with respect to those water rights at issue here, the practical consequences are diminished because the Nevada legislature also established a fund to compensate holders of water rights for the value of rights that were subject to an administrative or legal challenge as of April 1, 1999. See § 5(4)(e), 1999 Nev. Stat. 2633. Holders of water rights that might otherwise be

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course of reviewing federal law questions. See *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960) (affirming a court of appeals' state law ruling that was not "clearly erroneous or unreasonable"); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596 (1959) (upholding a court of appeals' construction of a state statute that was carefully considered and not clearly wrong); *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949) (accord); *Palmer* v. *Hoffman*, 318 U.S. 109, 118 (1943) (refusing to set aside a federal court's application of state law where there was no showing of plain error).

subject to forfeiture under the court of appeals' decision may opt to retire their water rights in accordance with that program and avoid any application of the forfeiture law to them.

3. Even if this case presented a matter of sufficient importance to warrant review, there would be no occasion to set aside the court of appeals' construction of state law. This Court does not disturb a court of appeals' construction of state law unless it is unreasonable or plainly wrong. See, *e.g.*, *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596 (1959). The court of appeals' decision here is neither. That decision reasonably construes Nevada's forfeiture law in the specific context of the Newlands Project. The court of appeals, both in *Alpine III* and the instant case, applied state law in light of its express terms and the underlying purpose of the forfeiture exemption provision, as set out by the Nevada Supreme Court in *Manse Spring*. *Alpine III*, 983 F.2d at 1496; Pet. App. A11-A12.

The court of appeals correctly recognized that Nevada's forfeiture-exemption provision is intended to insulate from forfeiture the pre-1913 rights of water users. Nev. Rev. Stat. Ann. § 533.085(1) (Michie 1995). Thus, in determining when "appropriations have been initiated" (*ibid.*), the statute requires the court to look not at when the United States acquired the right to store water for the Project, but at when the individual water user whose right might be subject to forfeiture first obtained the right to irrigate his land. *Alpine III*, 983 F.2d at 1496. That reasonable interpretation places Newlands Project water users in the same position as holders of water rights elsewhere in the State. It also avoids the anomalous result of granting a forfeiture exemption to all users of Project water—some of whom

did not obtain their water contracts and apply water to land until the 1940s and 1950s (see *Alpine II*, 878 F.2d at 1221 n.7)—based on the United States' actions in 1902. See *Alpine III*, 983 F.2d at 1496; Pet. App. A12-A16.

The court of appeals correctly rejected petitioners' view that the actions of the United States in acquiring a water right for the Project as a whole should be treated as the actions of the individual water users in "initiat-[ing]" their own appropriations. Pet. App. A12-A13. As the court explained, that construction "would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute" and would insulate from forfeiture those who had full notice "that any water rights they acquired would be subject to forfeiture." *Id.* at A13. In any event, even if petitioners' interpretation provided a plausible alternative construction of state law, the fact remains that the court of appeals' construction, grounded in Nevada case law and carefully analyzed in two separate opinions, is reasonable and certainly not plainly wrong.

Petitioners also assert that the decision nullifies state water law and conflicts with the Nevada Supreme Court's decision in *Manse Spring*. Nevada Pet. 12-16; TCID Pet. 11-17. Those arguments are without merit. The *Alpine III* decision expressly recognized that "[d]etermining when [water] rights vested is a matter of Nevada law." 983 F.2d at 1495. Both the *Alpine III* court and the court of appeals in the instant case expressly relied on the Nevada Supreme Court's ruling in *Manse Spring* to discern the purpose of Section 533.085 of the Nevada Revised Statutes Annotated. Indeed, when the Tribe in *Alpine III* moved to certify the threshold forfeiture question to the Nevada

Supreme Court, the Nevada State Engineer opposed certification, and the court of appeals declined to certify "[b]ecause the law of Nevada is clear." *Alpine III*, 983 F.2d at 1491 n.3.[6]

4. Petitioners also contend that review is warranted because the decision is a collateral attack on the *Orr Ditch* decree and conflicts with this Court's ruling in *Nevada* v. *United States*, 463 U.S. 110 (1983). Nevada Pet. 21-23; TCID Pet. 7-11. Petitioners argue that the *Orr Ditch* decree confirmed a right in the United States to water for the Newlands Project with a priority date of July 2, 1902, and that *Nevada* ruled that the individual users of Project water were the successors to the right affirmed to the United States in the *Orr Ditch* decree. The court of appeals, however, expressly rejected the contention that its decision concerning the meaning of the forfeiture statute was determined by the water rights' priority date. The court "agree[d] with the Engineer and the district court that the priority date for all of the rights at issue in this case is 1902." Pet. App. A14. The court explained, however, that its holding "did not concern a priority date" but rather concerned "the forfeiture exemption provided by § 533.085." *Ibid.* For the same reasons, the decision does not conflict with this Court's decision in *Nevada*.

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[6] There is also no merit to Nevada's assertion (Pet. 13) that the validity of the court of appeals' decision is suspect because the panel consisted of judges from California and Arizona. This is not a case of state law being construed by "'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). *Alpine III*, which provides the rule for the instant decision, was authored by Judge Brunetti, who practiced law in Nevada for 21 years prior to his appointment to the bench in 1985. See 2 *Almanac of the Federal Judiciary* 51 (2002).

Nevada held that water users in the Newlands Project succeeded to the rights confirmed in the *Orr Ditch* decree and that res judicata principles precluded the United States from using those rights for other purposes. This case does not address the priority date of the water rights in question, and it does not work any reallocation of rights confirmed in the decree.

5. Finally, petitioners assert that the decision improperly applies the concept of reasonable investment-backed expectations to Nevada water law and conflicts with *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). See Nevada Pet. 17-21; TCID Pet. 18-19. The court of appeals, however, made no ruling regarding the application of takings law to Nevada's forfeiture statute. Contrary to petitioners' assertions, the court did not rule on background principles of state law and did not "apply" the doctrine of reasonable investment-backed expectations to Nevada water law. The court simply used the "modern parlance" of takings law, specifically the terminology of reasonable investment-backed expectations, to explain its understanding of the purposes of the Nevada legislature in enacting the forfeiture exemption provision. See Pet. App. A12. The court's use of takings parlance merely elucidated its understanding of the legislature's concerns and how the forfeiture exemption should be construed in light of those concerns. Because the court of appeals did not rule in any manner on the application of takings jurisprudence to water rights at the Newlands Project, its decision does not and cannot conflict with *Palazzolo*, which addressed distinct issues of just compensation law that do not affect the outcome of this case. See, *e.g.*, *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2002

Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

Nos. 01-1224, 01-1226

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UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

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BRIEF FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

Respondent Pyramid Lake Paiute Tribe of Indians joins and adopts the BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI. The Tribe opposes the petitions for the reasons stated by the United States.

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April 2002